

260

**DECLARATION OF DEFENSE**

**SUPREMACY COURT OF THE UNITED STATES**

**CHANDLER, JOHN, and**

**THE OTHERS**

**vs. THE UNITED STATES OF AMERICA**

**DECLARATION OF DEFENSE**

**ON THE**

**THE**

**THE**

**THE**

**THE**

**THE**

(30,322)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 379

CHARLES SHERWIN AND HARRY H. SCHWARZ,  
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States district court for the northern district of Texas.....	1	1
Caption.....(omitted in printing)..	1	1
Order designating district judge.....	1	1
Indictment .....	3	1
Demurrer and motion to quash indictment.....	40	22
Amended plea of immunity.....	47	27
Reply .....	53	30
Verdict .....	58	32
Judgment and sentence.....	59	33
Bill of exceptions.....	62	33
Testimony of Charles Sherwin.....	63	35
Exhibit No. 1—Letter from Federal Trade Commission to General Lee Development Interests, June 30, 1922.....	64	36
Exhibits Nos. 4 to 7—Telegrams.....	64	38
Government's Exhibits 1, 2, and 3—Declaration of trusts .....	60	30

	Original	Print
Government's Exhibit—Contract between General Lee		
Development Interests and H. H. Schwarz et al. ....	96	54
Testimony of H. H. Schwarz.....	124	69
J. S. Swinson.....	125	60
H. L. Arterberry.....	128	71
Defendants' requested instructions to jury and orders		
overruling same.....	129	72
Court's instructions to jury.....	133	74
Argument of counsel.....	134	75
Verdict and judgment.....	135	75
Order settling bill of exceptions.....	136	76
Assignment of errors.....	137	76
Petition for and order allowing writ of error.....	143	80
Supersedeas bonds on writ of error (omitted in printing) ..	145	81
Cost bond on writ of error..... (omitted in printing) ..	149	81
Statement re writ of error and citation.....	150	81
Præcipe for transcript of record.....	150	81
Opinion, Bledsoe, J.....	152	82
Clerk's certificate.....	165	89
Proceedings in the United States circuit court of appeals.....	166	89
Argument and submission.....	166	89
Opinion, Walker, J.....	167	89
Judgment .....	176	95
Petition for rehearing.....	177	95
Order overruling petition for rehearing.....	192	103
Clerk's certificate.....	193	103
Order granting writ of certiorari.....	194	104

[fol. 1]      **IN UNITED STATES DISTRICT COURT**

CAPTION—Omitted

SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

ORDER DESIGNATING DISTRICT JUDGE—Filed May 16, 1923

The Senior Circuit Judge of the Fifth Circuit having certified that by reason of the accumulation and urgency of business in the District Court for the Northern District of Texas, in the Fifth Circuit, [fol. 2] the district judges of said district are unable to perform speedily the work of their district, and that he has found it impracticable to designate and assign a sufficient number of district judges of other districts within the Fifth Circuit to relieve said accumulation and urgency of business; and the Senior Circuit Judge of the Ninth Circuit having consented to the designation and assignment of the Honorable Benjamin F. Bledsoe, United States District Judge of the Southern District of California in the Ninth Circuit, to hold the district Court in the Northern District of Texas, during the period beginning May 16, 1923, and ending June 9, 1923.

Now, therefore, pursuant to the authority vested in me by Section 13 of the Judicial Code, as amended by the Act of Congress approved September 14, 1922, inasmuch as in my judgment the public interest so requires, and it appearing impracticable to designate and assign a district judge of a circuit adjoining the Fifth Circuit for such service, I do hereby designate and assign the Honorable Benjamin F. Bledsoe to perform the duties of district judge and hold a district Court in the Northern District of Texas within the Fifth Circuit, during the period beginning May 16, 1923, and ending June 9, 1923, and for such further time as may be required to complete unfinished business.

Wm. H. Taft, Chief Justice of the United States.

Dated Washington, D. C., May 13, 1923.

[File endorsement omitted.]

[fol. 3]      **IN UNITED STATES DISTRICT COURT****INDICTMENT**

At a regular term of the United States District Court for the Northern District of Texas, begun and holden on the 12th day of March, A. D. 1923, within and for the Fort Worth Division of the Northern District of Texas, at Fort Worth, Texas, the Grand Jurors

for the United States, selected, tried, impaneled, sworn and charged to inquire into, and true presentment make of all offenses under the laws of the United States committed within said district, upon their oaths present in open Court and charge:

That heretofore, and prior to the several acts of using the United States Mails hereinafter set forth, Robert A. Lee, Charles Sherwin, Harry H. Schwarz, William Schloss, Phillip Goldstein, and otherwise called Ralph P. Gibson, Robert Ball, Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch otherwise called M. Haas, and Walter Marks, (all hereinafter in this indictment called defendants) had devised and intended to devise a scheme and artifice to defraud and to obtain money and property by false and fraudulent pretenses, representations and promises from Alice M. Kane, A. L. Askanas, J. H. Bohmfolk, A. S. McDougal, Violet R. Bowen, C. F. Throm, A. C. Bayette, Mrs. Emma O. Lewis, and various and divers other persons whose names are to the Grand Jurors unknown, and the public generally, (a class of persons not susceptible by reason of their great number, and want of information on the part of the Grand Jurors of all being named herein), said persons being hereinafter referred to as the persons to be defrauded, and to obtain money [fol. 4] and property from said persons to be defrauded by means of false and fraudulent pretenses, representations and promises; the said scheme and artifice being in substance as follows, to-wit:

That the said defendants would organize and promote divers oil companies and sell the shares thereof, to-wit: General Lee Interests No. 1, divided into 1,250 shares of the par value of \$20.00 each, General Lee Interests No. 2, divided into 900 shares of the par value of \$20.00 each, General Lee Development Interests, divided into 250,000 shares of the par value of \$1.00 each, and divers other similar concerns to the Grand Jurors unknown, all under the guise and in form of trust estate and with principal offices at Fort Worth, Texas, for the pretended purpose of engaging in the production and sale of oil and the sale of oil and gas leases and engaging in the oil business in general, for profit, and that they would issue large amounts of shares or certificates of beneficial interest in said companies and that they would sell the same to any and all of said persons to be defrauded whom they could induce to purchase said shares or certificates by making false and fraudulent representations, pretenses and promises concerning said companies and also as to the standing, character and qualifications of the defendant Robert A. Lee, claiming also that he was related to General Robert E. Lee, and concerning very large dividends and profits at an early date to their shareholders of certificate of interest holders and that such false and fraudulent representations, pretenses and promises would be made by said defendants and their sales agents, both orally and by written and printed matter advertisements and publications, in order [fol. 5] to induce said persons to be defrauded to purchase beneficial interest in said companies, such representations to be made through and by means of newspapers, magazines, and other publications, and in form of posters, circulars, pamphlets and circular letters and

personal correspondence, all of which said matter was and would be sent to said persons to be defrauded, for the purpose of inciting and inducing said persons to purchase said shares or beneficial interests in said companies, and to pay over their money and property to the said defendants, in order that they, the said defendants, might fraudulently appropriate and convert large portions thereof, to their own use and benefit.

And the said defendants planned and schemed, that for the purpose of so inciting and inducing said persons to be defrauded to deliver over to them, the said defendants, their money and property, they, the said defendants, would make false and fraudulent pretenses, representations and promises, in substance and in effect, as follows, to-wit:

(1) That the said companies were under personal and complete management and direction of General Robert A. Lee; that the said General Robert A. Lee was a descendant of Robert E. Lee, the great Confederate general, and of the historic Lee family; that as General Robert E. Lee gave his life to the cause of the South so now was General Robert A. Lee giving his life to the oil industry and the great cause of humanity; Whereas, in truth and in fact, as the said defendants then and there well knew the said companies were not under the personal and complete direction of the said Robert A. Lee but were controlled and dominated by the defendants Charles Sherwin and Harry H. Schwarz, who had procured and associated [fol. 6] with themselves the said Robert A. Lee for the purpose of using the historic name of the Lee family and his pretended relationship with the great Confederate general, Robert E. Lee in order to appeal the more strongly to the persons to be defrauded and thereby incite and induce the said persons to be defrauded to purchase the shares or beneficial interests in the said companies; and the said Robert A. Lee was not in fact a descendant of the said Confederate General Robert E. Lee, nor of the historic Lee family, nor was he giving his life to the oil industry or the cause of humanity, but was only helping to promote a fraudulent scheme.

(2) That the said General Robert A. Lee was known far and wide as a great geological engineer; that he was a man of long and successful experience as a petroleum geologist; that he was in fact a miracle man of geology; that he had made fortunes for others by the location of scores of producing oil wells in California; in Oklahoma, and in various fields of Texas, and among geological men was revered and admired; Whereas, in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee was not known far and wide as a great geological engineer nor as a geological engineer at all and he was not a man of long successful experience as a petroleum geologist or of any experience whatever as such geologist; he was not in fact a miracle man of geology nor had he made fortunes for others by the location of scores of producing oil wells in California, Oklahoma and Texas, or in any of those states, nor was he revered or admired among geological men or of any repute whatever among such class of men but was in fact

a laborer without expert knowledge and never known to the public as a geologist.

[fol. 7] (3) That the said General Robert A. Lee had been in the employ of the richest and biggest interests whose names are a by-word in the financial world and had helped thousands to make fortunes; that he had never bought a piece of acreage for a client that had not been productive and had never made a location for an oil well that had not come in a successful producer of oil; Whereas, in truth and in fact, as the defendants then and there well knew, the said defendant Lee had not been in the employ of the richest and biggest interests known to the financial world or helped others to amass fortunes but in fact loaned his name to said scheme for \$12.50 per week, and had theretofore been employed as janitor in the state capitol of the State of Idaho, and was not and is not a locator of oil wells.

(4) That the said General Robert A. Lee, in behalf of General Lee Interests No. 1, had invaded the Mexia fields and had found the Mexia mother pool and was offering his friends the opportunity of enlisting in his young army of future millionaires; that he, the said General Robert A. Lee, who had never located a dry hole, was offering this chance to profit with him in his mother pool leases: Whereas in truth and in fact, as the said defendants then and there well knew the said defendant Lee had not found the mother oil pool in the Mexia field or any other oil field, and the alleged army of millionaires was only a myth invented by the said defendants in promoting the said scheme, and the said defendants had no opportunity of profit to offer to anyone in any alleged pool leases, but in fact were promoting wild-cat and semi-wild-cat territory procured by the said defendants at about \$5.00 per acre.

[fol. 8] (5) That he, the said General Robert A. Lee, for General Lee Interests No. 1, had purchased three leases in the district where he had found the said mother pool; that the said three leases aggregated 200 acres of land; that these 200 acres were to cost only \$25,000 (Twenty-five Thousand Dollars), and that he had already paid a portion thereof himself that it was only through his personal influence that he was able to get this marvelous acreage at such a ridiculously low price and that he was offering his friends the opportunity of sharing his good fortune with him: Whereas in truth and in fact, as the said defendant then and there well knew, that he, the said Robert A. Lee had not himself purchased the said three leases composing the acreage for General Lee Interests No. 1 and had not paid Twenty-five Thousand Dollars therefor, nor any portion thereof himself, and it was not true that this acreage was acquired at a ridiculously low price through his personal influence and he was not offering his friends the opportunity of sharing good fortune with him but only to invest their money in a questionable and highly speculative enterprise.

(6) That this was the first time General Lee had asked his friends for money to assist him in his operations; that he was positively not

a promoter; that he knew nothing about these so called promotion schemes and wanted to know even less about them; that he was just a plain, honest-to-goodness man who had been the instrument used by the big companies to locate oil; that he has enough money to provide for himself and if he had made for himself only a percentage of the profits that he had made for others he would be worth millions and that now he was determined to let the world share in these riches and [fol. 9] vast wealth that would be forthcoming when the drill should prove that his knowledge of the oil structure of Texas was far superior to that of any geologist who had ever traced a structure: Whereas in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee had joined in this promotion scheme and loaned his name and alleged family history to the same to be used by the said defendants in the promotion of the said scheme; and the said Robert A. Lee had never been used by big companies to locate oil wells, and had not made millions for others and had no superior knowledge of oil structure or any scientific knowledge thereof whatever, but was an impecunious old man who had jointed the other defendants herein in the said scheme and artifice for a small sum which they were willing to pay him for the fraudulent use of his name in the promotion of the said companies.

(7) That the tremendous possibilities of profit from the leases in said General Lee Development Interests No. 1, staggered the imagination and appalled human comprehension, and that these tremendous profits, these royal riches would be paid just as surely as oil was found on these adjoining leases and that it would be a wonderful day for every man who had pinned his faith on General Robert A. Lee: Whereas in truth and in fact, as the said defendants then and there well knew, the representations as to tremendous possibilities or profit from the leases in General Lee Development Interest No. 1, staggering the imagination and appalling human comprehension was a highly exaggerated, inflammatory and fraudulent statement made only for the purpose of inciting and inducing the said persons to be defrauded to part with their money and property in the purchase of shares or beneficial interests therein.

[fol. 10] (8) That the said General Robert A. Lee Interests No. 1 was quickly oversubscribed; that Yankees and Rebels alike had swamped the said General Robert A. Lee with orders and purchased every interest in his leases within fifteen days; that for this reason he had organized General Lee Interest No. 2 for those too late to get in on his No. 1 and was offering positively the only chances to get in on these lease interests: Whereas in truth and in fact, as the said defendants then and there well knew every interest in General Lee Interest No. 1 had not been purchased within fifteen days nor at any time, but a large number of shares remained unsold and Interests No. 2 was organized only because the said defendants believed themselves able thereby to incite and induce the said persons to be defrauded, to purchase further shares and so to defraud the said persons out of their money and property.

(9) That the letters written to the said General Robert A. Lee by his friends telling of the great confidence and of the faith they had in him had made his heart glad and had acted as an inspiration for him to attempt bigger things and had been the cause of his organizing the General Lee Development Interest; that in this third enterprise also he had made one decision first, namely, to place his name and the great honor of it behind the organization: Whereas in truth and in fact, as the said defendants then and there well knew that whatever letters were written to the defendants expressing confidence and faith in them or either of them was due to the false and fraudulent representations herein set forth and only inspired the defendants to make further false and fraudulent statements and the said companies were [fol. 11] organized for the sole purpose of obtaining money and property from the persons to be defrauded by false and fraudulent pretenses, representations and promises.

(10) That the first selection of the said General Robert A. Lee for the said General Lee Development Interests was a spot in North Texas where he had discovered what he believed to be the apex of the most promising oil structure in all Texas, the goal for which oil men had been seeking for years; that this structure was so definite and pronounced that he had named it the Roanoke Uplift in honor of the little town of Roanoke, Texas; that he was planning to drill his first well on this remarkable structure and had contracted for 6,183 acres of land in that vicinity, which he considered the best prospective oil lands in Texas: Whereas in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee had not discovered the apex of the most promising oil structure in all Texas not any promising oil structure whatever; and the said structure was not definite and pronounced and was not of any reasonable oil prospects, but in fact was of a most unpromising wildcat character condemned by reputable geologists.

(11) That the plans carried out by the said General Robert A. Lee stamped the enterprise of the General Lee Development Interests unquestionably as one of the most ambitious and at the same time certain of fulfillment that the oil world had ever known; that the said General Robert A. Lee was to drill ten wells for the said General Lee Development Interests and was giving an iron-clad pledge and guarantee to get production for his army of investors; that this was a plain and positive guarantee that before he completed the enormous [fol. 12] task he had set out to accomplish oil would be running into the pipe lines for the benefit and enrichment of his many followers: Whereas, in truth and in fact, as the said defendants then and there well knew, the plans announced by the said defendants in the name of Robert A. Lee were not the most certain of fulfillment that the oil world had ever known or certain at all, but were falsely devised with the intent and purpose of defrauding the public and the said pledge and guarantee that ten wells would be drilled and that production would be obtained and oil running into the pipe lines was made and advertised only for the purpose of more readily inciting

and inducing the said persons to be defrauded to deliver to the said defendants their money and property.

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made, and planned to be made by said defendants were false and untrue, and at all the times mentioned herein were known by the defendants, and each of them, to be false and untrue, and to be made by the said defendants with the purpose and intent of inducing the said persons to be defrauded to pay to them, the said defendants, large sums of money for shares or certificates of interests of the said companies, and which said shares or certificates of interests were then and there of much less value than the persons to be defrauded were to pay for the same, all of which the said defendants then and there well knew.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present and find that the said defendants, so having as aforesaid devised the said scheme and artifice to defraud, in and for executing the same, and in attempting so to do, did unlawfully, wilfully, [fol. 13] feloniously and knowingly on the 13th day of April, 1922, at Fort Worth, in the County of Tarrant, State of Texas, in the Division and District aforesaid, and within the jurisdiction of this Court place and cause to be placed in the Post Office of the United States at said Fort Worth, a certain letter enclosed in a postpaid envelope addressed to Miss Alice M. Kane, 14 Warren Street, Roxbury 19, Mass., which said letter is in substance as follows, to-wit:

"Robert A. Lee, Geologist

Suite 505 Burk Burnett Building, Fort Worth, Texas

4/13/22.

Miss Alice M. Kane, 14 Warren St., Roxbury 19, Mass.

DEAR MISS KANE: I wrote you a few days ago telling you that I was organizing General Lee Development Interests. I also told you some of the reasons. This is the third and probably the last opportunity my friends and followers will have to make further investments with me.

In my letter to you I sketched roughly my plans. I advised you not to make any further investments in oil securities until you had heard from me, and now I am going to tell you why I asked you to wait.

Before I tell you of my plans for the General Lee Development Interests you will doubtless want to know something regarding the General Lee Interests, in which you are interested with me.

Our leases in the northwest extension are looking better each day; [fol. 14] due to the fact that almost daily new locations are being made and derricks going up. There are scores of wells being drilled near our holdings. Many of these have had wonderful showings of gas and oil at different depths, and the logs of each that I have seen check up almost identically with those of the biggest wells drilled in the Mexia field proper, and I think it will be just a matter of

time before one of these wells will come in. When one does make a producer our leases will be worth many times their present value.

The only unfortunate part of the whole matter, which requires our patience, is that we are not drilling these wells ourselves. If I were supervising the drilling of them I am certain that I would be making much speedier headway. I am satisfied with the way they are being drilled and managed however, and it is sometimes better for others to drill more slowly.

The best news that I received last week was about the Davidson well. At a depth of approximately 1,140 feet this well was reported to be making six million cubic feet of gas. A gasser of this size at such a shallow depth will, of course, pay, but not in proportion to what a good oil well would, and I have been informed that they will continue drilling for oil. This well, of course, can be plugged back at any time but I predict that it will never be done because I think that when they reach the depth at which they will find the Woodbine sand they will bring in the biggest oil well that has ever been brought in, in Mexia.

All of this news I am sure is of as much interest to you as it is to me. It merely shows that up to date my predictions have all proven true, and I want you to always bear in mind all that I further say.

Remember, I have never located a well that did not prove a producer, and I have never selected a piece of acreage that did not prove productive.

[fol. 15] It is needless for me to further recount to you the anxious and successful years that have combined to make a lifetime full to the brim of activity and accomplishment. It is needless for me to tell you of this. When I tell you face to face that my heart and soul thrill with the anticipation of the greatest achievement that is to come, you can readily picture yourself, the success that is in store for General Lee Development Interests.

The letters you have written me in the past telling me of the confidence and of the faith you have in me certainly make my heart glad. The words you have written me have acted as an inspiration for me to attain the bigger things. I have hundreds and hundreds of letters before me now which mainly have been the cause of my organizing the General Lee Development Interests.

When I decided to form the General Lee Development Interests, as I did when I organized General Lee Interests Nos. 1 and 2, I made one decision first. It was this—I would put my name and the great honor of it behind the organization. That was my first step. You know how much the name of Lee means to me. The name Lee stands for everything that is true and honorable and courageous in life. It is a name that has won distinguished honor in this nation. It is a name that says "Honor first."

When I gaze back on the pages of history and meditate on the achievements of the family of Lee, their deeds come up before my eyes in what is really a pageant of achievement. I see Richard Henry Lee pleading for liberty alongside of Patrick Henry in the Virginian assembly; I see the famous "Light Horse Harry" Lee

giving impetus to American Independence by his courage and bravery during the Revolutionary war; I see our own General Robert E. Lee at Gettysburg, staunch and unafraid; I see the accomplishments of countless hundreds of Lees adding luster to the brilliant events of our history.

I can see, as if it were just yesterday, when General Robert E. Lee, leaving my father's farm in Tennessee, called me to him, placed his hands on my shoulders and said "Bobby, keep the name of Lee always first in your mind. The name of Lee is a name of honor. It has never been dishonored and stands without a stain. Keep it so, Bobby. Be square and honest, for there is a reward for clean dealing that cannot be purchased with wealth."

These words have ever rung in my ears. They have been etched into my heart and have been uppermost in my business dealings with my fellow man. To that principle I attribute more than to any other one thing the measure of success that I have attained in my profession.

And it's the spirit that I held fast to when I decided to give my name and my time, my purse and my honor, to General Lee Interests Nos. 1 and 2, and to the General Lee Development interests, which I have just organized.

You know that I am a man well along in years. You know that I do not crave the wealth of this world, rather would I have my name emblazoned upon the hearts of my fellowmen throughout this nation that are striving to get ahead in the world. Money can mean but little to me. I have enough to permit me to live in comfort the rest of my days, but I will never rest, I will never quit my geological work in the old fields of the great Southwest, until I have made it possible for my hundreds of associates, friends and followers to share in the most marvelous wealth in the world that comes from the successful drilling of true oil structures.

[fol. 17] I come to you again with the clean hands of a man who has been trusted, and who has never broken faith with his followers, a man who is successful, a man who has made money for himself and fortunes for others. My thousands of friends, associates and followers insisted on my starting General Lee Development, Interests and letting them join me. I am firmly convinced of the tremendous possibilities offered in the Mid-Continental fields where there are many undiscovered structures yet to be located and drilled.

Now as to my plans:

I will drill ten wells for oil.

This is not a meaningless array of words; it is a promise reverently given and one that will be strictly and conscientiously and honorably adhered to.

The first well will start soon, and the others will come rapidly after it. There will not only be one chance for riches, but many of them. And more even than the elaborate and comprehensive drilling program I have mapped out. I am making the important declaration.

I positively guarantee to get production.

That's what I mean in just so many words. I will positively get

production. Before I have completed my remarkable campaign of development, I give you my ironclad guarantee that oil will be running into the pipelines for the benefit and enrichment of my followers.

You know that I have never made a promise that I did not keep; I shall keep this one. The determination to succeed in this enterprise has gripped me and holds me steadfast to my task.

If I could take you out in the field with me, where I am most at home, I would take you to the finest oil structure in my opinion in [fol. 18] the whole United States. It is a structure that I have named in honor of the little town of Roanoke, Texas, where I have lived for a long time, and where I know most everyone and everyone knows me.

This is a structure that would delight and please you, as it gladdened me. I believe that the Roanoke Uplift is the best chance for oil in Texas today. I shall do my level best to bring in on this marvelous sym-etrical oil structure the biggest gushers that North America has ever seen.

As *it* told you I would do in my last letter, I am writing you first. I am letting you know of the organization of General Lee Development Interests because you responded so freely and so readily upon receipt of my first invitation; because you are my partner in my other ventures.

When I tell you that I am going to drill ten wells, and when I tell you that I am positively going to get production for you, you also know that you can further bank upon my word. I have never broken faith with you, and you know that I never will.

I want you to take advantage of this offer at once. If you cannot make payment of all of the interests that you will want you may send me your check for as much as you can, and I will reserve more for you and you can pay for them at a later date. The point is that I want you interested in every oil venture that I go into and, as I said before, this will probable be my last, and there is no doubt that it will be the biggest and most stupendous drilling campaign ever carried on before in the Mid-Continental oil field by any individual or company whose capitalization is only \$250,000.

[fol. 19] The enclosed application blank is for your convenience. Wired reservations will be held until your letter has had time to reach me. I will await an answer from you.

Faithfully yours, Robert A. Lee. RAL. H.

P. S.—Remember these interests are only \$1.00 each. You may take all that you can conveniently carry."

and which said letter was to be sent and delivered by the postoffice establishment of the United States to the addressee thereof, and at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter and circular was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

## Second Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, to further present, that said defendants, on May 19th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, and allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, willfully, [fol. 20] knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter, addressed to one Alice M. Kane, 14 Warren St., Roxbury 19, Mass., of the tenor following, to-wit:

"General Robert A. Lee, Geologist

Edwards Building

Fort Worth, Texas, May 19, 1922.

Miss Alice M. Kane, 14 Warren St., Roxbury, 19, Mass.

DEAR MISS KANE: A few days ago I received your telegram reserving 300 additional interests. I did not answer this wire. I was awaiting your check and letter.

Today I received your check for \$100.00 as part payment on these interests with the notation that you will pay the balance some time in June, which is, I assure you, satisfactory. This will make in all 500 interests that you will have.

I certainly enjoyed reading your letter, and am glad to know that you feel that you could confide in me. Do not hesitate to write just the way you feel. Anything you tell me, I assure you, will be treated as strictly confidential.

Apparently you are not very well versed in the oil business, and just anything that you want to know, I assure you, will be explained to you in detail.

[fol. 21] The spudding in of a well means the commencing of actual drilling. Many leases in the oil fields are secured on drilling contracts. As an example—when we get a well in Roanoke on our 6,000-acre tract we will not care to drill all of the balance of this land ourselves, but will want some of the larger companies to drill part of it for us. We will let many so-called drilling contracts, and in each case we will give them a specified time in which they have to start actual drilling.

As an example—say we give one of the companies a drilling contract to drill on a 50-50 basis—this is, they take 50% of the oil and give us 50% of the oil, they to pay the actual cost of drilling on

a 40-acre tract. Now, in our contract we will specify that they will have to start actual drilling within a period of thirty days from that date. Sometimes it will be impossible for them to get their derrick erected in time for the commencing of this drilling. In a case of this kind, rather than lost their contract they will move a small rig out to the lease, which we call a spudding machine, and spud in so that they will not have to forfeit their contract. In other words, it means, as I told you above, merely the commencing of actual drilling.

Now, Miss Kane, you will probably want more than 500 interests before they have all been sold. You will not necessarily have to pay all of this amount in June, and if you would care to have 1,000 of them I would be pleased to hold them for you, and you may make payments in July and in August, and regardless of what price they may be selling for at these dates, yours will be issued to you at their present par value.

With my very kind regards, I am,

Faithfully yours, Robert A. Lee." RAL: EL.

[fol. 22] That at the time of the placing and causing to be placed the said letter in the postoffice at the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

### Third Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said defendants on May 25th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter, self addressed envelope to the defendant Robert A. Lee, application blank for interests in General Lee Development Interests and also a certain booklet or folder concerning "The Honor of the Lees," addressed to one A. L. Askanas, 704 Pantages Bldg., Los Angeles, Calif., of the tenor following, to-wit:

[fol. 23]

General Robert A. Lee, Geologist  
Edwards Building

Fort Worth, Texas, May 25th, 1922.

Mr. A. L. Askanas, 704 Pantages Bldg., Los Angeles, Calif.

DEAR MR. ASKANAS: At the request of many of my friends, I had a little booklet—"The Honor of the Lees"—printed a few weeks ago. I only had a very few of these made at that time and sent them to those of my friends who wanted one. It seems that every one of my friends to whom I sent this booklet must have told their friends, nearly everyone in the country who has not received one has written me asking me to send one to them.

Now, I don't remember whether I sent you one or not, but anyway I want you to have one before they are all gone again, so to make sure I herewith enclose you one.

I want you to read every word I have written—I am sure you will—those lines never grow old to me—I never tire recalling the great and valorous deeds of the Lees, and I am sure you are equally proud of the part they have played in the founding of this great and glorious nation of ours. Let your children read and study it. Let the name of Lee be an inspiration to them to attain the higher ideals, and may it be one of the means of making better men and women of them, patriotic and loyal citizens, such as every Lee mentioned in its pages.

I am going right along now with my development plans. My [fol. 24] derrick is now almost completed. I am letting a contract for the drilling, and actual operations will be commenced now without delay.

Our first well is to be drilled right in the center of our immense 6,000 acre tract, which gives us absolute control of this entire field.

Operators now realize the value of this tract to the extent that already I am receiving numerous bids for many of them to drill small tracts on a 50-50 basis. In fact one of my followers states that he will be down next week to make me an offer to drill part of this lease.

Just as soon as this well is under way I will arrange to start our second and third wells in some of the other mid-continental fields. As I have told you before, nine other wells are to follow rapidly until I have finished this stupendous campaign, and I positively guarantee production.

I have sold more than half of this present issue now, and if you have decided how many more of these interests you will want, I want you to write me at once so that I can take care of you. Regardless of how many of these interests I am now holding for you, and whether or not you are in position to pay for them now, I want you to reserve all that you will ever want, because otherwise I will not be able to protect you.

I am enclosing you another application blank, and want you to attend to this matter today.

I am going to keep you advised at all times as to our development, and ask you to write me from time to time and ask me anything you want to know, because I am always glad to hear from you.

With my very kindest regards, I am,

Faithfully yours, Robert A. Lee. RAL-M.

[fol. 25] P. S.—Please notify me by return mail when you receive this booklet.”

said envelope having the following printed thereon:

“General Robert A. Lee, Edwards Building, Fort Worth, Texas,”  
said application blank being in words and figures as follows:

“Application Blank

General Lee Development Interests

Edwards Building, Fort Worth, Texas

Date: — —, —.

General Robert A. Lee.

DEAR SIR: I desire to become a member of your General Lee Development Interests and enclose herewith the sum of \$— in full payment for — interests.

It is my understanding that these interests are fully paid and non-assessable, and that I am to share pro rate and in proportion of my investment, in all profits which may accrue from the sale of oil or gas, or any properties now owned or which may be hereafter acquired by these interests.

\$10.00 buys	10 interests.	Name: — —.
50.00 buys	50 interests.	Street or P. O. Box: —.
100.00 buys	100 interests.	City: —. State: —.”
300.00 buys	300 interests.	
500.00 buys	500 interests.	
1,000.00 buys	1,000 interests.	

[fol. 26] said booklet or folder concerning the honor of the Lees being an illustrated and biographical sketch of the historic Lee family, that at the time of the placing and causing to be placed the said letter together with the said enclosures in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter and enclosures was for the purpose of executing said scheme and artifice: contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

## Fourth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that said defendants, on June 20th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises, described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, willfully, knowing- and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Alice M. Kane, 14 Warren St., Roxbury, 19 Mass., of the tenor following, to-wit:

[fol. 27] "General Robert A. Lee, Geologist,  
Edwards Building

Fort Worth, Texas, June 20, 1922.

Miss Alice M. Kane, 14 Warren St., Roxbury, 19, Mass.

DEAR MISS KANE: I am sending you under separate cover a booklet I had printed for you and other of my friends. The booklet tells the story of the Declaration of Independence. This great document of human liberty should be in every home in America, and in my opinion it ranks second in importance to but one other, the most sacred, The Holy Bible.

The Declaration of Independence, though simply written, tells the story of political freedom, civic liberty that has endured and will endure for hundreds of years, written as it was by men thoroughly American in ideals, hopes and aspirations.

Can you blame me for the thrills that stir my heart when I look back and read of my own forebears, Richard Henry Lee and Fitzhugh Lee, who took the first steps in the early Colonial struggle for freedom? My heart warms with the inspiration of it, and I know that every other good American feels the same.

We find in the second paragraph—"That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness"—'and the pursuit of happiness.'

[fol. 28] Man cannot have happiness without conscience, no matter how much wealth he may possess, but with a clear conscience and sufficient money with which to purchase his worldly needs, there is no reason why every one cannot enjoy happiness.

A man is as good as his word.

I am going to take this opportunity to tell you what progress I have made in the short time of only a few weeks.

We will progress much more rapidly now, however, because although the details are seemingly small for the commencing of a drilling campaign, the actual starting is of the most importance. A little time spent now in getting everything in proper shape for the drilling of wells will save days and even months sometimes during the progress of actual drilling.

The derrick, as you know, is now completed, and when you receive this letter the rig should be on the ground for the drilling of our first well on the 6,000-acre tract at Roanoke.

A man's word should be his bond.

I promised the good people of Roanoke I would be drilling this well by the 27th day of June, and although I hope to be well under way by that time, every one knows that when I make a declaration I adhere to it, and they all know that this well will be drilling by the 27th of this month.

As soon as this well is drilling my plans are to start well No. 2 and when it is drilling to commence the drilling of No. 3, and so on until I have completed the drilling of ten wells, and have production in the pipe lines—production that I positively guarantee to get.

Two Lees, as you will see in the booklet I sent you, were signers of the Declaration of Independence, our political independence that [fol. 29] was obtained on July 4th, 1776. Financial independence is what I am striving to get for you, and by July 4th, 1922, we will be on our way toward this financial independence, riches, wealth and 'the pursuit of happiness.'

Now, Miss Kine, every one appreciates the merit of this proposition the same as you, and every one who knows about it is straining a point to purchase every interest he can possibly carry while these interests are still on the market at their present par value.

You know just as well as I do that the big money made in oil securities is made by buying interests at par, coming in on the ground floor the same as you did, and regardless of how many interests you now have reserved, I want you to write me today, and let me hold just as many more for you as you think you can possibly carry.

I hope you will enjoy reading the booklet I sent you. I will appreciate hearing from you.

Sincerely yours, Robert A. Lee. RAL:EL

P. S.—I will try and answer your letters the same day I receive them as I have in the past, but a great deal of my time will be spent in the fields and your answers may be delayed a day or two."

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

[fol. 30]

## Fifth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid do further present, that said defendants on July 24th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Mrs. Violet R. Bowen, 1306 Wood St., Dallas, Texas, of the tenor following, to-wit:

"General Robert A. Lee, Geologist

Edwards Building

Fort Worth, Texas, July 24, 1922.

Mrs. Violet R. Bowen, 1306 Wood St., Dallas, Texas.

DEAR MRS. BOWEN: My final summons—my last call to you.

I have written you several times and have sent you circulars upon two different occasions trying to impress upon you the fact that [fol. 31] General Lee Development Interests is the real oil deal of the hour, telling you the real importance of your making an investment in this wonderful proposition, no matter how small this investment might be.

It was with no little thought that I took upon myself this greatest of undertakings,—this responsibility—that of the organization of the General Lee Development Interests when I promised you and everyone of my friends and followers that I would drill ten wells and positively guarantee without quim or quibble to get production.

After I had finished my plans and had outlined the procedure that I would undertake, I sat down and immediately wrote you and told you about it. I wanted to let you and all of my partners who were interested with me in the organization of General Lee Interests know of this before I gave the general public an opportunity to procure any of these interests.

\$250,000.00 is a small amount of money with which to drill ten oil wells, more especially so when the first one I am drilling will in all probability cost \$50,000. But \$250,000.00, the amount of the capital of General Lee Development Interests is a lot of money when one is raising it solely through the mails, soliciting only checks in amounts from \$10.00 to \$100.00 each. Stop and consider one minute. Were I to take in \$1,000.00 every working day, it would require better than 42 weeks to sell these interests,—almost a whole year."

and such letter ending as follows:

"On June 27th I spudded in Well No. 1 on the immense 6,000-acre tract at Roanoke and have already reached a depth of nearly 500 feet, and before many more weeks we should have one of the greatest producing wells ever brought in on this continent.

[fol. 32] A \$10 bill, a \$20 bill, or even \$100 is not going to break you. In fact, this amount of money will not even help to make me. But this small amount of money invested in General Lee Development Interests may be the means of affording some of the luxuries that this life affords and of which you and yours are entitled. It is not selfishness on my part. As a matter of fact, if I thought you were sending me one single dime under protest, if I thought that you bought one single interest and were not doing so of your own free will and accord I would not think of accepting it for one minute and would return the money to you the day it was received.

Remember, these interests have only been on the market but a very few weeks and I have but few remaining to sell. The time now is short in which you can come into this proposition at par and it now requires quick action on your part.

Don't delay another minute. This is positively the last chance you will ever have at buying General Lee Development Interests unless you are willing to pay from five to ten for one for them.

Send in your remittance today, if even but for ten interests.

With my very kindest regards, I am,

Faithfully yours, Robert A. Lee." RAL:LF.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme and artifice: contrary to the form of the statutes in [fol. 33] such cases made and provided and against the peace and dignity of the United States of America.

#### Sixth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said Robert A. Lee, Charles Sherwin, Harry H. Schwartz, William Schloss, Philip Goldstein, otherwise called Ralph P. Gibson, Robert Ball, Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch, otherwise called M. Haas, and Walter Marks, defendants, continuously throughout the period of time from January 1st, 1922, to the date of the filing of the indictment, at Fort Worth, in the County of Tarrant, State of Texas, in the division and district aforesaid and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers offenses against the United States Court, the divers offenses charged against said defendants in the divers counts of this indictment preceding this count and made offenses by section 215 of the Penal Laws of the United States;

and that said defendants did thereafter do divers acts to effect the object of said unlawful and felonious conspiracy, to-wit, not only the several acts of placing letters, circular letters, advertisements and publications in the postoffice of the United States at Fort Worth aforesaid, described in said several preceding counts, but numerous acts of preparing said letters, circular letters, advertisements and publications, for mailing, and the newspaper and magazine advertisements and publications in said first count mentioned for publication and of making the false and fraudulent pretenses, rep-[fol. 34] resentations and promises in the first count of this indictment described and obtaining by means thereof the money and property of persons belonging to the class of persons in said first count mentioned, as well as certain other overt acts now here specified; that is to say:

#### Overt Acts

(1) The said defendants on March 11th, 1922, at Fort Worth aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to Miss Alice M. Kane, 14 Warren St., Roxbury, Mass., which said telegram was of the following tenor and effect, to-wit:

"Fort Worth, Texas, Mar. 11, 1922.

Miss Alice M. Kane, 14 Warren St., Roxbury, Mass.:

As skew and Kirby wells look like certain producers our leases almost sure to be worth many thousands per acre when these wells come roaring in have only thirty eight interests left to sell will again be over-subscribed am reserving you five more interests until I hear from you you may take all or any part of them am keeping faith with you giving you every chance to share a big fortune with me you must decide at once advise.

General Robert A. Lee."

(2) The said defendants on May 6th, 1922, wrote and caused to be written a certain letter at Fort Worth, Texas, in said division and district and addressed to Mr. C. F. Throm, 383 Nebraska Avenue, Toledo, Ohio, and enclosed said letter in a postpaid envelope and [fol. 35] deposited and caused to be deposited in the postoffice of the United States at Fort Worth aforesaid, and which said letter is in the following tenor and effect, to-wit:

"Mr. C. F. Throm, 383 Nebraska Ave., Toledo, O.

DEAR MR. THROM: There is nothing that I would like better than to be able to call on you and have a nice, long talk and tell you of the developments of General Lee Interests No. 1 and General Lee Interests No. 2.

I would like to tell you about the Davidor well, which came in making ten million cubic feet of gas per day, and of the scores of other wells drilling near our leases, which make our holdings look so good.

I would like to tell you of my General Lee Development Interest, my latest and in all probability my last venture of this kind, for which I am going to drill ten wells and for which I am guaranteeing to get production.

To get away for a few days would mean that I would have to neglect my work here, and that would mean the retarding of our progress, so a personal visit is out of the question.

I want you to know all of the above and more so I am sending my personal representative from Fort Worth. Ask him any questions that you want to know, I assure you it will be a pleasure for him to answer them for you. Any courtesies shown him will be greatly appreciated by me.

With very kind regards, I am,

Faithfully yours, Robert A. Lee." RAL-H.

[fol. 36] (3) That the said defendants on June 3rd, 1922, at Fort Worth aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to C. F. Throm, 383 Nebraska Ave., Toledo, O., which said telegram was of the following tenor and effect:

"Ft. Worth, Tex., 1922, Jun., 3—p. m. 2.17.

C. F. Throm, 383 Nebraska Ave., Toledo, Ohio:

My personal representative Mr. N. J. Lang, will call on you Monday with good news for you.

General Robert A. Lee."

(4) That the said defendants on June 20th, 1922, at Fort Worth aforesaid, in said division and district, wrote and caused to be written a certain circular letter, and on said date caused the said circular letter together with a printed circular to be enclosed together in an envelope to be deposited in the postoffice of the United States, at Fort Worth aforesaid, said circular letter being on a letter head of General Lee Development Interests, said letter commencing "From General Robert A. Lee, Fort Worth, Texas."

and concluding "faithfully, Robert A. Lee."

(5) The said defendants on July 11th, 1922, at Fort Worth, aforesaid, in the said division and district wrote and caused to be written a certain letter, and on said date aforesaid caused the said letter to be deposited in the postoffice of the United States at Fort [fol. 37] Worth aforesaid, which said letter was in the following tenor and effect:

"July 11, 1922.

Mr. C. F. Throm, 401 Hunt St., Toledo, Ohio.

DEAR MR. THROM: In answer to your good letter of the 3rd, I wish to state that I am sending my representative, Mr. Marks, to call on you, and I am sure that he will explain everything to your entire satisfaction.

If I were not so busy with the drilling of the well on the 6000-acre tract at Roanoke I would like to make this trip myself, but hope you will appreciate that it is impossible for me to do this now.

With kindest regards, I am,

Faithfully yours, Robert A. Lee." RAL:LF.

(6) That in pursuance of said letters and telegram to C. F. Throm hereinabove mentioned the said defendants Max Hirsch, otherwise called M. Haas and Philip Goldstein called on the said C. F. Throm as representatives of the said General Robert A. Lee and the General Lee Development Interests and induced and persuaded the said C. F. Throm by making to him glowing and glittering promises as to the condition and possibilities of said company, to turn over to them large sums of money and property in payment for shares and certificates of interests in said company.

(7) That in pursuance of said letters and telegram hereinbefore [fol. 38] mentioned the defendant Nathan H. Sang, otherwise called N. J. Lang called on C. F. Throm and induced and persuaded the said Throm to make further and larger investments in said company.

(8) That in pursuance of said letters and telegram hereinbefore mentioned the defendant Walter Marks called on the said C. F. Throm and by further statements and representations to the said Throm induced him to make further and larger purchases of said shares or certificates of interest in said company.

(9) That in pursuance to certain letters written by the defendants to Mrs. Emma O. Lewis, Lexington, Ky., the said Mrs. Lewis was advised that a personal representative of the said Robert A. Lee and General Lee Development Interests would call upon her and in pursuance thereof the said defendant William Schloss called on the said Mrs. Emma O. Lewis and showed her a letter of introduction from the said General Robert A. Lee; that the said Schloss represented that the company was in a very flourishing condition and would pay a 20 per cent dividend the first of September and five per cent per month thereafter, thereby including and persuading the said Mrs. Emma O. Lewis to make other and further investments in said company.

(10) That on September 29th, 1922, said defendant Robert Ball Jr., called on the said Mrs. Emma O. Lewis and presented to her a letter of introduction from the said General Robert A. Lee, the said Robert Ball Jr., representing that he was a son-in-law of Colonel Humpries an oil operator of Texas and by making other and further statements concerning the prospects and possibilities of said General

Lee Development Company the said Mrs. Emma O. Lewis was induced and persuaded to make other and further investments in said company.

[fol. 39] (11) That in pursuance of said scheme the said defendant Ralph P. Gibson called on the said Mrs. Emma O. Lewis and made other and further representations to her and induced and persuaded the said Mrs. Emma O. Lewis to turn over to said defendant Gibson large numbers of securities and property of the value of several thousand dollars, in exchange for shares or certificates of interest in said company.

12. That the said defendant Ralph P. Gibson called on Miss Alice M. Kane, Roxbury, Mass., and induced and persuaded her to turn over a large amount of securities of the value of several hundred dollars, in exchange for shares or certificates of interest in said company.

(13) That in pursuance of said scheme said defendants Max Hirsch otherwise called M. Haas, and Ralph P. Gibson called on the Rev. William J. Vincent, New Orleans, La., and presented to the said Vincent a letter of introduction signed by General Robert A. Lee, and said defendants made representations and promises to the said Vincent and induced and persuaded the said Vincent to make investments in said General Lee Development Interests.

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

D. B. Burroughs, Foreman of the Grand Jury. Henry Zweifel, United States Attorney. H. L. Arterberry, Special Assistant U. S. Attorney. S. R. Rush, Special Asst. to Attorney General.

[fol. 40] [File endorsement omitted.]

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF TEXAS, FORT WORTH DIVISION

THE UNITED STATES OF AMERICA

vs.

ROBERT A. LEE et al.

DEMURRER AND MOTION TO QUASH INDICTMENT—Filed May 14,  
1923

To the Honorable United States District Court for the Northern  
District of Texas, Fort Worth Division:

Now come the defendants Charles Sherwin and Harry H. Schwarz,  
and without waiving their pleas in abatement heretofore filed herein,

but still insisting upon same, make and present this their demurrers and exceptions to the said indictment and motion to quash same, and say that the indictment is insufficient in law and should be quashed, and for such grounds respectfully show the Court:

## 1

That neither the indictment as a whole, nor any count therein contained charges these defendants with any violation of the laws of the United States.

[fol. 41]

## 2

The first count does not definitely state or charge that these defendants "for the purpose of executing such scheme or artifice and attempting so to do" did place or cause to be placed any letter in a post office of the United States. The charging of said count with reference to the mailing of said letter, as appears in the last paragraph on Page 8, of said indictment and continuing upon page 9 thereof, is as follows: "That the said defendants, so having as aforesaid, devised the said scheme and artifice to defraud, in and for executing the same, and in attempting so to do, did unlawfully, wilfully, feloniously and knowingly on the 13th day of April, 1922, etc., place and cause to be placed in the post office of the United States at said Fort Worth, a certain letter, etc., (then follows the letter shown on pages 9, 10, 11 and 12 here omitted) and which said letter was to be sent and delivered by the post office establishment of the United States to the addressee thereof, and at the time of the placing and causing to be placed the said letter in the post office of the United States, as aforesaid, the defendants then and there well knew that said letter and circular was for the purpose of executing said scheme and artifice." While the language used in the indictment as copied aforesaid states that "the defendants then and there well knew that said letter and circular was for the purpose of executing said scheme and artifice", still it wholly fails to allege that the same was placed or cause- to be placed by the defendants in the post office of the United States "for the purpose of executing said scheme and artifice."

The language used in the indictment above referred to is vague, indefinite and uncertain and only by inference attempts to charge [fol. 42] the defendants with the offense of using the mails for the purpose of carrying out or executing a scheme to defraud previously devised, and in this particular Count No. 1 of said indictment is fatally defective, and charges no offense against the laws of the United States of America.

## 3

Said Count No. 1 is also fatally defective and charges no offense against the laws of the United States in that it is indefinite and uncertain just what the alleged fraudulent scheme attempted to be charged and set out on Page 2 of said indictment was, and does not apprise the defendants of the nature of the alleged fraudulent scheme with which they are attempted to be charged, such as to enable them

to prepare their defense thereto, and said indictment fails to charge any facts showing on the face of the indictment that a scheme to defraud was devised or intended to be devised by the defendants except by implication and inference, and no direct averments are made describing any such scheme which it is alleged these defendants either devised or intended to devise. And the scheme and artifice to defraud, etc., as attempted to be charged in the indictment is vague, indefinite and uncertain, and does not place these defendants upon notice of what the alleged scheme was, and they are thereby not apprised of same so as to be able to prepare their defense thereto. And in this particular said count is fatally defective and charges no offense against the laws of the United States.

## 4

The second count is fatally defective and charges no offense against [fol. 43] the laws of the United States, in that it fails to charge any fact showing venue or where such alleged offense was committed, in that the language used in said count of said indictment is as follows: "Did place and caused to be placed a certain other letter in the post office of the United States there to be sent and delivered by the post office establishment of the United States", and wholly fails to charge in what post office of the United States said letter was placed or caused to be placed, and wholly fails to name any such post office, and wholly fails to state that same was mailed at any post office within the jurisdiction of this Court, and in this particular said count is fatally defective.

## 5

The third count is fatally defective and charges no offense against the laws of the United States, in that it fails to charge any fact showing venue or where such alleged offense was committed, in that the language used in said count of said indictment is as follows: "Did place and caused to be placed a certain other letter in the post office of the United States there to be sent and delivered by the post office establishment of the United States," and wholly fails to charge in what post office of the United States said letter was placed or caused to be placed, and wholly fails to name any such post office, and wholly fails to state that same was mailed at any post office within the jurisdiction of this Court, and in this particular said third count is fatally defective.

## 6

The fourth count is fatally defective and charges no offense against [fol. 44] the laws of the United States, in that it fails to charge any fact showing venue or where such alleged offense was committed in that the language used in said count of said indictment is as follows: "Did place and cause to be placed a certain other letter in the post office of the United States there to be sent and delivered by the post office establishment of the United States", and wholly fails to charge in what post office of the United States said letter was placed

or caused to be placed, and wholly fails to name any such post office, and wholly fails to state that same was mailed at any post office within the jurisdiction of this Court, and in this particular said fourth count is fatally defective.

## 7

The fifth count is fatally defective and charges no offense against the laws of the United States, in that it fails to charge any fact showing venue or where such alleged offense was committed, in that the language used in said count of said indictment is as follows: "Did place and cause to be placed a certain other letter in the post office of the United States, there to be sent and delivered by the post office establishment of the United States", and wholly fails to charge in what post office of the United States said letter was placed or caused to be placed, and wholly fails to name any such post office, and wholly fails to state that the same was mailed at any post office within the jurisdiction of this Court, and in this particular said fifth count is fatally defective.

## 8

The sixth count wherein is attempted to be charged the offense of [fol. 45] conspiracy is fatally defective and charges no offense of conspiracy to use the United States mails for fraudulent purposes, or any other offense against the laws of the United States, in that it wholly fails to allege that at the time the defendants are charged to have conspired, combined, confederated and agreed together to commit the divers offenses charged against the defendants in the first five counts of said indictment, that it was a part of the original scheme that the defendants would use the United States mails for the purpose of executing, or attempting to do so, the said scheme to defraud, and failing to so charge that the defendants intended as a part of the original scheme to use the United States Mails, said sixth count in the indictment is fatally defective, and does not charge the offense of conspiracy to use the United States mails for fraudulent purposes, or any other offense against the laws of the United States.

## 9

Said indictment and all of the counts therein, fail to charge any offense against the laws of the United States for the reason that the Grand Jury which returned and presented the same into this Honorable Court was not lawfully selected, drawn, empaneled and organized as provided by law, and all of its acts, including the presentment of the indictment herein, were without authority of law, null and void;

## 10

That another person unauthorized by law was present during the investigation of said Grand Jury, to-wit: Mr. Benjamin Allred, one of the Assistant United States District Attorneys for the Northern

[fol. 46] District of Texas, who attended the sessions of said Grand Jury only in the capacity of a stenographer taking down the testimony developed before said Grand Jury, and who was not present as an authorized attorney for the purpose of developing any investigation of alleged criminal offenses; said Mr. Benjamin Allred was present while said Grand Jury was investigating the matters that resulted in said Grand Jury finding and returning the indictment herein again-t these defendants, and was present for no other purpose, as defendants are informed and believe and here allege, than to take down the testimony of witnesses in question and answer form, and did perform said stenographic service and labor, and none other, while before said Grand Jury. That while said Mr. Benjamin Allred was before said Grand Jury another attorney for the Government was present and examined the witnesses, and conducted the proceedings, and Mr. Benjamin Allred's presence before said Grand Jury during said time was purely in the capacity of stenographer as aforesaid, and that because of the facts aforesaid, the presence of said Mr. Benjamin Allred was unauthorized under the law.

That as defendants are informed and believe and here allege, the stenographic notes of the testimony of witnesses were partly reduced to writing by the said Mr. Benjamin Allred and partly turned over by him to other persons to reduce the same to typewriting, such other persons being in no way connected with said Grand Jury. That the said Mr. Benjamin Allred was an unauthorized person to be present with said Grand Jury under the circumstances hereinbefore set out, and his presence under the circumstances not being an authorized person under the law, was and amounted to a deprival of a substantive right of these defendants, to-wit, the right to have [fol. 47] no unauthorized person present during the sessions of the grand jury while their cases were being investigated and evidence thereon heard.

Wherefore, for each and all of the foregoing objections, exceptions and demurrers these defendants move the Court to sustain the same, and quash and set aside the indictment filed again-t them herein, and that they be permitted to go hence without day.

McLean, Scott & Sayers, Attorneys for Defendants Charles Sherwin & Harry H. Schwarz.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## AMENDED PLEA OF IMMUNITY—Filed May 23, 1923.

To the Honorable United States District Court for the Northern District of Texas, Fort Worth Division:

Now come the defendants Charles Sherwin and Harry H. Schwarz, and after having entered their plea of not guilty herein, and after their plea of immunity heretofore filed on the — day of May, A. D. 1923, was by the Court overruled, and with special permission of the Court to so "plead over" and present the same and the evidence thereon to the jury for a hearing and determination, [fol. 48] present this their amended and amplified plea of immunity in bar of any prosecution by virtue of the indictment heretofore returned against them jointly on the — day of April A. D. 1923, wherein they are charged with the offence of violating Article 215 *or* the Criminal Code of the United States for the alleged offense of having placed letters etc., in the United States Mails for the purpose of executing a scheme and artifice to defraud as previously alleged, and for such plea would respectfully show the Court:

That they were connected as officers with certain oil companies known as General Lee Interests No. 1, General Lee Interests No. 2 and General Lee Development Interests, which were each common law trusts, and that they were so connected with said companies as such officers prior to the convening of the Grand Jury which returned the indictment against them herein, and that prior to the convening of the Grand Jury as aforesaid, and prior to the filing against these defendants of any complaint or charge, that one John F. Southworth, who at said time was either a member of the Federal Trade Commission, or one of its duly authorized agents, either or both, came to the offices of these defendants and demanded evidence concerning said oil companies above named, and of the participation by these defendants of the promotion of said companies; also demanded that each of these defendants answer his lawful inquiries with reference to said companies and these defendants' connection therewith; and that these defendants had previously thereto refused to give any testimony with reference thereto to the said Southworth and to said Federal Trade Commission; and that upon the said Southworth's coming in person to the offices of these defendants as aforesaid, he demanded of these defendants that they produce all their documentary evidence showing how and in what manner said companies were organized and operated and demanded and required of these defendants by virtue of the lawful authority vested in him, to answer certain questions then and there by said officer demanded of these defendants under the pains and penalties of violating the law and subjecting themselves to imprisonment and fine in case they refused to give said evidence and to

produce said documentary proof and documents, as hereinabove mentioned.

That the first demand of the Federal Trade Commission was in the form of a letter, which said letter contained copy of a part of the law relating to the giving of evidence before the Federal Trade Commission, and containing the penalty of non-compliance therewith, but did not contain any portion of the law relating to immunity, commanding that these defendants answer certain questions and furnish certain testimony in response thereto, and these defendants thereupon consulted their attorney, namely: R. F. Turner, Esq., and said attorney advised them that they did not have to furnish such information or give such testimony as was being demanded by the Federal Trade Commission, and relying upon said attorney's advice and his knowledge of the law, they then and thereafter refused to comply with such demand, or to in any manner furnish testimony of any character concerning their business or letters and documents connected therewith. That thereafter the said John F. Southworth, authorized agent and examiner of the Federal Trade Commission appeared in person at their office and again demanded of these defendants that they produce their books, documents, contracts and letters of and concerning the affairs, conditions [fol. 50] operations, control and management of said oil companies herein mentioned, and these defendants again declined to furnish said information, or to give said testimony, stating to the said Southworth that their attorney had advised they not to do so; that thereupon the said Southworth requested the name and address of their said attorney, which was furnished to the said Southworth, and as these defendants believe, and so believing allege it to be a fact, the said Southworth left their offices and consulted with the said attorney for the purpose of convincing said attorney that it was the duty of these defendants to answer all questions and furnish all testimony demanded by the said Southworth, and that their failure so to do would make them liable to the punishment prescribed in Article 8836-J; that the said Southworth did confer with the said Turner and produced and read to the said Turner all of the law contained in Articles 8836-A to 8836-K inclusive, and the said Southworth advised the said Turner that these defendants by the terms of said law were forced and compelled to give such testimony and that a failure to do so would make them subject to the punishment prescribed therein, and further advised the said Turner that the giving of such testimony on the part of Sherwin and Schwarz would not in any manner hurt or effect them in criminal prosecution, for that under the terms of said law the said Sherwin and Schwarz would not thereafter be subject to prosecution for any offense concerning which they were giving and were commanded to give such testimony, and that the terms of the law applicable to the Federal Trade Commission included common law trusts as well as corporations. That the said Turner, as attorney for these defendants, thereupon advised the said Sherwin and Schwarz that their oil companies came within [fol. 51] the purvue of said Articles 8836-I and 8836-J, and that their giving such testimony to the said Southworth would not hurt

them, and that unless they did comply with the demands of the said Southworth they would be subject to fine and imprisonment, or both, by virtue of their failure to do so, and then and there advised these defendants to furnish said testimony, documents and letters, and to answer such questions as were demanded by the said Federal Trade Commission through the said Southworth.

That in obedience to the lawful demand of the said Federal Trade Commission, acting by and through the said John F. Southworth, either as a member thereof, or as an authorized agent thereof, these defendants produced, exhibited and delivered to said officer said documentary evidence showing how and in what manner said oil companies were organized, and showing the connection of these defendants therewith, and of other persons therewith, and of the character and kind of business then being done, and the nature of said business, and in fact all of the documents and records of said oil companies then in the possession of these defendants, and in addition thereto, did orally testify before said officer and answer all of the questions then and there by him propounded, and fully complied in every way with the demands of said Federal Trade Commission acting by and through said office under the benefits, pains and penalties of the Law.

That thereafter, the Grand Jury of the Northern District of Texas, at Fort Worth, Texas, convened and the evidence given by these defendants to the said Federal Trade Commission was delivered over and produced before said Grand Jury which heard and considered [fol. 52] the same in the investigation of the case then pending against these defendants, and upon said evidence, or at least a major part of it, the said Grand Jury found the bill of indictment against these defendants in this case.

That because of the facts as hereinabove set out under authority of Article 8836-I of the United States Compiled Statutes of 1918, and Article 8836-J of said Statutes, by virtue of these defendants having been required as hereinabove set out, to give testimony against themselves, and to introduce all of their documentary evidence showing their connection with the oil companies as above set out, all of which was used as evidence against them and which was used for the purpose of criminating them, and each of them, these defendants each plead their immunity to prosecution in this case, because of their having been required as aforesaid to furnish to the said Federal Trade Commissioner their evidence both oral and documentary, as above mentioned all of which it too numerous and voluminous to set out in this motion, but which these defendants each aver was required of them under such circumstances as that under the law they cannot be prosecuted about any transaction or matter or thing concerning which they each testified and produced as evidence, documentary or otherwise, before the Commission or agent thereof, as hereinabove set out.

Wherefore, defendants and each of them pray that the issue of their immunity and evidence thereon be submitted to the jury for determination and that said plea be in all things sustained, and

that they be dismissed further prosecution herein without further answer.

Charles Sherwin, H. H. Schwarz

[fol. 53] Jurat showing the foregoing was duly sworn to by Charles Sherwin and Harry Schwarz omitted in printing.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—May 28, 1923

Now comes the United States of America, by Henry Zweifel United States Attorney for the Northern District of Texas, and for replication to the Amended and amplified plea of immunity, of the defendants Charles Sherwin and Harry H. Schwarz in the above entitled cause, respectfully alleges as follows:

1. That neither of said defendants either by compulsion under [fol. 54] subpoena, or under oath, gave testimony or produced documentary evidence concerning any matter or things set forth in the indictment herein or in said plea alleged, and he therefore denies that said defendants, or either of them, obtained or are entitled to immunity from prosecution herein by reason of their alleged testimony and statements, or by reason of the production of any documents to or upon the demand of the Federal Trade Commission or any representatives as set forth in said plea, and he further denies that the said defendants, or either of them, were ever subpoenaed to testify or ever testified under oath, for or upon the demand of the Federal Trade Commission, or any other branch of the Government in connection with any matters or things or concerning any company or trust estate or concerning their own relations to any of the matters or things which are or may be involved in the charges laid against said defendant in the indictment herein.

2. That the prosecution herein relates exclusively to an alleged violation of Section 215 of the Criminal Code of the United States and of Section 37 of the Criminal Code of the United States, and relates in nowise to any violation of the Federal Trade Commission Act or to any other law of the United States, except as above set forth.

3. That neither of said defendants were at any time ever called before the grand jury which returned this indictment against said defendants, nor before any grand jury considering any violations of what is known as the Mail Fraud Statutes, nor did either of them at any time testify or produce documents before any such grand jury on that subject, except that the defendant Harry B. Schwarz voluntarily

[fol. 55] appeared and requested to go before said grand jury and to testify in his own behalf, and thereupon signed a waiver of immunity, which is in words and figures as follows, to-wit:

"Fort Worth, Texas, March 31, 1923.

"I, H. H. Schwarz of Fort Worth, Texas, do hereby voluntarily request the United States Grand Jury, sitting at Fort Worth, Texas to permit me to appear before them in the matter now under consideration concerning Robert A. Lee, Charles Sherwin, H. H. Schwarz, and associates, and concerning the General Lee Oil Interests, and request the foreman to administer the oath of a witness to me, acknowledging herein that I have been duly warned by H. L. Arterberry Special Assistant United States Attorney of the United States of America, that I do not have to make a statement at all but that any statement I do make must be free and voluntary statement and that whatever statement I may make can be used against me in any proceeding in which I may become a party in any Court of the United States and cannot be used for me or in my behalf.

"I again state that this is a free and voluntary statement and that it is at my own instance and request that I am now before the United States Grand Jury at Fort Worth, Texas, for the purpose of making a statement concerning the matters aforesaid which the said grand jury is now considering.

H. H. Schwarz."

4. In behalf of the United States the United States Attorney denies that J. F. Southworth, the authorized agent and examiner of the [fol. 56] Federal Trade Commission advised R. F. Turner, Esq., attorney for said defendants, that the failure of the defendants to answer questions propounded by him and to furnish testimony demanded by him, said Southworth, and to furnish documentary evidence at his request and demand would subject the said defendants to the punishment prescribed by the said Federal Trade Commission Act and denies that the said Southworth advised the said Turner that the giving of such testimony and the answering of said questions and the furnishing of said documents would secure for the said defendants immunity from any criminal prosecutions, as alleged in said Amended and Amplified plea.

5. Said United States Attorney further says that the alleged evidence and information, both documentary and otherwise, alleged to have been given to the said J. F. Southworth, as a representative of the Federal Trade Commission, if any such evidence was given, was entirely independent and apart from the evidence upon which said defendants were indicted herein; that none of the alleged information or evidence documentary or otherwise, alleged to have been given and furnished to the said defendants, or either of them, was presented to the grand jury, or was in anywise used against said defendants in the representation of this cause before the grand jury, or in the securing of said indictment; that none of said information or

evidence, documentary or otherwise was in the possession of the Government Attorneys or agents of the Government or post office inspectors connected with the present proceedings, nor did any of said persons have any knowledge of the said alleged proceedings before the Federal Trade Commission or its representatives until the filing of the defendant's original plea of immunity herein, nor has any of said al-[fol. 57] leged information and evidence, documentary or otherwise, been used against said defendants in this or any other proceedings.

6. The said United States Attorney further says that, at the time of the alleged giving and furnishing of the information and evidence, documentary or otherwise by the said defendants it is nowhere shown in said plea or in the record or in any other manner that the defendants, or either of them at any time, refused to furnish said information or evidence on the ground that it might tend to incriminate him, or that said defendants, or either of them at any time prior to the filing of their original plea of immunity, made any claim of immunity in connection with the matter aforesaid, or any of them.

Wherefore plaintiff prays judgment of the Court.

Henry Zweifel, United States Attorney for the Northern District of Texas.

Jurat showing the foregoing was duly sworn to by Henry Zweifel omitted in printing

[fol. 58] [File endorsement omitted.]

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# IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed May 28, 1923

On this the 28th day of May, 1923, this cause was regularly reached on the docket and called for trial, and then came the United States by their District Attorney, Henry Zweifel, Esq., and came also the defendants Robert A. Lee, Charles Sherwin and Harry H. Schwarz in their own proper person, and all parties announced ready for trial, and thereupon came a jury of twelve good and lawful men to-wit, C. P. Jefferson, J. W. Layton, C. H. Graves, J. D. Reager, J. M. Watson, W. M. Coffey, Leslie Jordan, T. W. Littlefield, N. Hood, M. M. Thompson, R. L. McCorkle, and J. L. English who were duly and legally selected, empaneled and sworn to try this cause, and the indictment in this cause having been read and the defendants, who had theretofore, to-wit, the 17th day of May, 1923 when arraigned waived the reading of the indictment and entered their pleas of not guilty and the said jury having heard the indictment

read and the pleas of not guilty entered by the defendants as aforesaid, and having received the charge of the Court, retired to consider of their verdict, and thereafter, on June 5th, 1923, returned into open Court the following verdict, to-wit:

[fol. 59] "With respect to the plea of immunity interposed by the defendants Charles Sherwin and Harry H. Schwarz herein, pursuant to the direction of the Court, we the jury find for the Government and against the defendants. N. Hood, Foreman," and "we, the jury find the defendant Robert A. Lee guilty on the first count of the indictment; guilty of the second count thereof; guilty on the third count thereof; guilty on the fourth count thereof; guilty on the fifth count thereof, and guilty on the sixth count thereof;

"As to the defendant Charles Sherwin, guilty on the first count of the indictment; guilty on the second count thereof; guilty on the third count thereof; guilty on the fourth count thereof; guilty on the fifth count thereof; and guilty on the sixth count thereof.

"As to the defendant Harry H. Schwarz guilty on the first count of the indictment; guilty on the second count thereof; guilty on the third count thereof; guilty on the fourth count thereof, guilty on the fifth count thereof, and guilty on the sixth count thereof.

N. Hood, Foreman."

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#### IN UNITED STATES DISTRICT COURT

#### JUDGMENT AND SENTENCE—Filed May 28, 1923

And the Court having received said verdict approves the same and orders that it be filed and entered. And the said defendants, Robert A. Lee, Charles Sherwin, and Harry H. Schwarz, being asked by the Court in open Court if they had anything to say why the sentence of the Court should not be pronounced upon them this time now here say nothing. It is therefore the opinion of the Court that the said defendants are guilty of the offense of violation of section 215 of the Criminal Code of the United States (using the U. S. Mail to defraud), and Section 37 of the Criminal Code charged [fol. 60] ing conspiracy to violate section 215 of the Criminal Code, as charged in the indictment and as found by the jury, and it is ordered and adjudged by the Court that the punishment of Robert A. Lee be and is hereby fixed at imprisonment in the United States Penitentiary at Leavenworth, Kansas for the term and period of two years in the first count of the indictment; two years in the second count of the indictment; two years in the third count of the indictment; two years in the fourth count and two years in the fifth count and two years in the sixth count and the second, third, fourth, fifth and sixth counts to run concurrent with the first count, and a fine of One Thousand (\$1,000.00) Dollars on the first count of the indictment; One thousand (\$1,000.00) Dollars on the second count;

One thousand (\$1,000.00) Dollars on the third count; One thousand (\$1,000.00) Dollars on the fourth; One Thousand (\$1,000.00) on the fifth, and One Thousand (\$1,000) Dollars on the sixth. It is further ordered and adjudged by the Court that the punishment of Charles Sherwin be fixed at imprisonment in the United States Penitentiary at Leavenworth, Kansas for the term and period of five years in the first count of the indictment; five years in the second count of the indictment; five years in the third count; five years in the fourth count; five years in the fifth count and two years in the sixth count. The first and second counts to run consecutive and the third, fourth and fifth and sixth counts to run concurrent with the first and second counts; and a fine of One Thousand (\$1,000) Dollars on the first count; One Thousand (\$1,000) Dollars on the second count; One Thousand (\$1,000) Dollars on the third count; One Thousand (\$1,000) Dollars on the fourth count; One Thousand (\$1,000) Dollars on the fifth count, and Ten Thousand (\$10,000.00) Dollars on the sixth count.

[fol. 61] And it is further ordered and adjudged by the Court that the punishment of Harry H. Schwarz be fixed at imprisonment in the United States Penitentiary at Leavenworth, Kansas for the term and period of five years in the first count of the indictment; five years in the second count of the indictment; five years in the third count; five years in the fourth count; five years in the fifth count, and two years in the sixth count. The first and second counts to run consecutive, and the third, fourth, fifth and sixth counts to run concurrent with the first and second counts; and a fine of One Thousand (\$1,000) Dollars on the first count; One Thousand (\$1,000) Dollars on the second count; One Thousand (\$1,000) on the third count; One Thousand (\$1,000) Dollars on the fourth count; One Thousand (\$1,000) Dollars on the fifth count, and Ten Thousand (\$10,000.00) Dollars on the sixth count. Said sentences to date from June 5th, 1923.

And it is ordered that the above named defendants be remanded to the County Jail of Tarrant County, Texas, until such fines are paid; the payment of any one fine not to operate as satisfaction of any payment of any other fine on any other count in the indictment, and the Marshal of the District is hereby ordered seasonably to transport and convey the said Robert A. Lee, Charles Sherwin, and Harry H. Schwarz from the county jail of Tarrant County, in Fort Worth, Texas, to the said United States Penitentiary at Leavenworth, Kansas, and there deliver them to the proper officer of the said penitentiary, to be there confined and imprisoned in said penitentiary until the term of imprisonment herein fixed is fully ended or until otherwise discharged in accordance with law, and the clerk is hereby [fol. 62] directed to issue the necessary commitment for the purpose of carrying into effect the sentence of the Court in this cause.

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## BILL OF EXCEPTIONS—Filed July 11, 1923

Be it remembered, that at a Term of the United States District Court for the Northern District of Texas, at Fort Worth, on the 28th day of May, A. D. 1923, the above styled and numbered cause was called for trial before the above Court, the Honorable Benjamin F. Bledsoe, Judge Presiding.

The plaintiff appeared by the Honorable Henry Zweifel, District Attorney, and David V. Cahill and H. L. Arterbury special assistants to the Attorney General; and the defendants, Charles Sherwin and Harry H. Schwarz appeared in person and by their counsel of record, McLean, Scott & Sayers; these defendants having heretofore filed their plea of immunity in bar of the Government's right to prosecute them herein, and their demurrers and motion to quash said indictment, and having entered their plea of not guilty upon being arraigned, thereupon, this cause came on for trial before said Court and said Jury, and the following proceedings were had, to-wit:

[fol. 63] These defendants Charles Sherwin and Harry H. Schwarz presented to the Court their demurrers and motion to quash the indictment, which motion is as follows, to-wit:

Motion omitted from the printed record, being heretofore copied at page 40.

\* \* \* \* \*

And the Court overruled the motion and the demurrers, to which action of the Court in overruling said motion and demurrers, and in not sustaining the same the defendants by their attorneys then and there in open Court excepted and still except, which said exception is now entered of record; and

Be it further remembered, that the defendants Charles Sherwin and Harry H. Schwarz presented their said plea of immunity to the Court and Jury, which said plea was duly verified, and was and is as follows:

Plea omitted from the printed record, being heretofore copied at page 47.

\* \* \* \* \*

And thereupon, and in support of said motion for immunity, CHARLES SHERWIN was called by the defense as a witness, and said witness did testify before the Court and Jury as follows, to-wit:

Mr. Sherwin: I am one of the defendants in this case. I am and was connected with the common law trust companies known as

[fol. 64] General Lee No. 1, General Lee No. 2 and General Lee Development Interests. Robert A. Lee, H. H. Schwarz and myself organized these three concerns and I have been a trustee in these three companies since their organization up to the present time.

I received a written communication from the Federal Trade Commission at Washington, D. C. I have not been able to locate all of these communications at this time. The document you hand me dated June 30, 1923, I received from and through the United States mail and I read the same.

(The defendant then offered in evidence letter dated June 30, 1923, and marked exhibit 1, which was admitted by the Court, and is as follows:)

#### DEFENDANT'S EXHIBIT 1

"Washington, June 30, 1922.

General Lee Development Interests, Edwards Building; Fort Worth, Texas.

SIRS: This Commission officially requests under Sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you cannot answer immediately please supplement your first statement with seven days upon the receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry.

This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as [fol. 65] it may deem in the public interest. It is believed that the small inconvenience of filing the information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein.

Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

"I received the two writings that you now hand me and I read them over, both of them (referring to exhibits 2 and 3) I did not make any reply to the letters of either of them at the time I received them. Later on I met a gentleman by the name of Mr. Southworth; he called on me at our office—that is, the office of the General Lee Development Interests. Mr. Schwarz and myself were present and we had a conversation with Southworth. He reported himself to be an agent of the Federal Trades Commission. He sent a card in with his name on it—John F. Southworth, Federal Trade Com-

mission. At that time he did not show us any other evidence of what he represented, but later on we saw that he carried a portfolio with letter heads and other documents with the Federal Trade Commission form, and from the time we first met him up until the present time, I believed and I still believe him to be the official of the Federal Trade Commission. When he called upon us and made himself and his official position known, he wanted to know why we had not answered the question-aires sent us from Washington. I told him we did not come under the jurisdiction of the Federal Trade Commission, because we were not an incorporation. Southworth then said we did come under the jurisdiction of the Federal Trade Commission, and that by not answering the question-aires sent to us we were committing a crime subject to a penalty [fol. 66] of imprisonment and fine, either or both. I told him I had consulted my attorney Mr. Turner at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we — fill out or file any question-aire sent to me by the Federal Trade Commission. Mr. Southworth then asked for the address of my attorney, and I gave it to him. He again told me we were committing a crime, and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. Southworth had an appointment with Mr. Turner and they met in our office and read the law to Mr. Turner, Mr. Schwarz and myself after which Mr. Turner then advised me that in accordance with that law, we were committing a crime by not answering the question.

Question. Now, then, what did you do?

Answer. We gave him everything that he demanded. The declaration of trust, copies of contracts, copies of leases, showed him record of our books gave him a list of the stockholders and some correspondence we had on some of them. We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him; in fact we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, the leases were partly typewritten and partly on forms filled in. He got the names of our stockholders from our stock ledger. The [fol. 67] stock ledger was furnished him by Mr. Schwarz. We were both present all the time, and acted together in furnishing Southworth this information.

This gentleman (Mr. Southworth) came to our office a half a dozen times before we gave him any information. After we began furnishing him with documentary evidence and information, he came to our office about twenty times.

When we left our office and this City, he left with these documents in his possession. After Southworth left the City we re-

ceived communications from him by telegram. The four documents you now hand me, are the two telegrams received from Southworth by us and my two replies thereto, and they are marked exhibits 4, 5, 6 and 7.

The exhibits were offered and admitted in evidence, and are as follows:

#### DEFENDANTS' EXHIBITS 4, 5, 6 AND 7

No. 4. "October 27. Eldorado, Arkansas, Charles Sherwin, care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, Eldorado, not received. Southworth."

No. 5. "Fort Worth, Texas, October 27, 1922. John F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz."

No. 6. "November 8th, Kansas City, Missouri. General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth."

[fol. 68] No. 7. "November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin."

At the time that the first telegram was received I was not in Fort Worth, but upon my return, Schwarz and I had a letter from the Federal Trade Commission by John F. Southworth, examiner, asking for these names to which the telegram referred. In obedience to the letter and telegram we wrote a list of the principal stockholders of the General Lee Interests, being names and addresses of these stockholders demanded at that time, and sent them to John F. Southworth, Kansas City, as requested, we furnished the names and addresses of these stockholders to Southworth. After that we received another communication from Southworth asking for another copy of our declaration of trust which Mr. Southworth claimed he had misplaced. We made and mailed same to him at Washington.

"Before we surrendered any information, documents or evidence to Mr. Southworth, there were discussions in our presence between him and our attorney about the law applying to our common law trust, and Mr. Southworth brought a book with him in which it elaborated as to whether or not a common law trust came under the jurisdiction of the Federal Trade Commission, and the fact that it was only supposed to cover corporations—that is, he brought a pamphlet covering common law associations.

I do not recall whether he claimed that was a decision by one of the Courts or a ruling of the Department, but my attorney then told me that I was subject to the penalty as the law stated, if I did not surrender.

[fol. 69] I never did make at any time, or intend to make any state-

ment that I had waived any rights which the laws of the land gave me. There was no discussion of the question of immunity between me and Southworth, or between me and anyone else.

The three (3) declarations of trust were offered by defendants and admitted by the Court without objection, the same being declaration of trust of the General Lee Interests No. One, General Lee Interests No. 2 and General Lee Development Interests, which said declarations of trust in the order named above are as follows:

#### GOVERNMENT'S EXHIBIT No. 1

##### Declaration of Trust

##### General Lee Interests to the Public

STATE OF TEXAS,

County of Tarrant:

Know all men by these presents:

That we, Robert A. Lee, H. J. Schwarz and Charles Sherwin, all of the County of Tarrant and State of Texas being the owners and holders of a certain contract made and entered into by and between ourselves as Trustee, as parties of the first part, and H. H. Schwarz, Abe Lebenson and Charles Sherwin as parties of the second part, dated the 12th day of April, A. D., 1922, by which contract the said H. H. Schwarz, Abe Lebenson and Charles Sherwin, agree to deliver to us assignments of oil and gas leases on certain tracts of land aggregating Six Thousand One Hundred Sixty Three (6,163) acres in Denton and Tarrant Counties in the State of Texas, and in which said contract we agree and bind ourselves to drill ten wells in [fol. 70] accordance with the terms of said contract, all for the sum of Two Hundred Fifty Thousand (250,000) Dollars to be paid as provided for in said contract to hereby declare and agree that we will and our successors shall hold the said contract and said assignments of said oil and gas leases and all other funds or property at any time transferred to or acquired by the trustees provided for herein in trust with the power and subject to the conditions hereof for the benefit of all persons who may hereafter own beneficial interests in the trust estate hereby created, and we, the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, do hereby declare that we will act as Trustees for said trust estate until the termination hereof as herein provided, or until our successor or successors shall have been elected and qualified as hereinafter provided, and,

Whereas, it is our intention that the said contract and oil and gas leases or assignments thereof above referred to shall be held by us as such trustees, upon the trust hereinafter expressed; and it is intended to create therein a trust estate and vest title to said properties in said trustees and their successors with absolute power to manage, control, hold and dispose of the same or any part thereof for the purposes herein stated, and,

Whereas it is likewise proposed that said contract and said assignments of oil and *has* [gas] leases and the proceeds and income therefrom so held by said trustees shall be by them held in a trust capacity as herein defined, for the benefit of the cestui que trustants (who shall be trust beneficiaries only, without partnership or any other associate relation whatever) and that the rights of the beneficiaries in said trust shall be evidenced by membership certificates of interest [fol. 71] est as herein provided, and the trust estate hereby created and so represented by us as said trustees is to be known as General Lee Development Interests.

Now, therefore, the terms, conditions and proposes under which said trust estate is created and is to be operated is hereby declared to be as follows, to wit:

That the trustee above named, whose designation as such us hereby accepted by the execution and acknowledgement of this instrument, and the confirmation of this declaration of trust and all amendments hereto, is and shall be ratified and confirmed by all holders of beneficial interests, and membership certificates herein by virtue of the receipt and acceptance by them of said membership certificates and certificates of beneficial interests herein issued and to be issued as hereinafter provided; and the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, now acting and speaking as well on behalf of their successors and in their own behalf do hereby declare to all such shareholders and members, present and future, and to all other persons interested, that they and their successors will hold all such property, contract and leases and assignments, so held by them or hereafter to be acquired by them, together with the proceeds thereof and the income therefrom, in trust during the period of his or their trusteeship as aforesaid to manage, control and dispose of the same absolutely, in the manner, and subject to the stipulations herein contained and all amendments hereof. The acceptance of which trust is evidenced by the trustees by their becoming signatory hereto, and by the members and holders of beneficial interests herein is evidenced by their receipt and acceptance of membership certificates and certificates of beneficial interests herein, as hereinafter provided for; the conditions of said trust being as follows:

The said Robert A. Lee, H. H. Schwarz and Charles Sherwin, shall be trustees of said estate and the term of office of such trustees shall be for and during the terms and continuation of said trust, as herein set forth, or until their successor or successors shall have been selected and qualified as herein provided.

In case of the death, resignation or inability to act of either or any of said trustees, the remaining trustees or trustee, shall have the power to accept such resignation and fill the vacancy, and in such event his successor or successors shall succeed to the same rights and powers, and be subject to the same duties and liabilities, and have the same rights and powers, and be subject to the same duties and liabilities, and have the same compensation as his predecessor; and thereupon the trust estate hereby created shall immediately vest in such new trustee together with the continuing trustees, without any fur-

ther act or conveyance of any kind. In case of the death, or resignation of any trustee, the remaining trustee or trustees shall have full power to manage and control this trust estate until the selection of his or their successor. In the event of the death, resignation or incapacity of any trustee who is acting as sole trustee then any stockholder may call a meeting of the holders of beneficial interests in this trust estate by giving notice by mail for ten days prior to any meeting called for to all shareholders of record on the books of this trust estate, at which meeting trustee may be elected to fill the vacancies.

[fol. 73] All investments shall be made, and all property shall be held, managed, controlled and disposed of absolutely by said trustees and their successors, with full discretionary authority and power as they would have if they themselves were the sole and absolutely owners of the properties hereinbefore referred to, or which may hereafter be acquired under this declaration of trust, absolutely free from all limitations, save and except specifically set forth herein; and such trustees shall have the power and authority in conducting the business of this trust estate to do all things necessary or proper to promote the purposes of this estate, and among other things the following:

(a) To own and hold the contract heretofore made with H. H. Schwarz, Abe Levenson and Charles Sherwin and themselves as trustees and to own and hold the leases and assignments of oil and gas leases on the tracts mentioned in said contract.

(b) The trustees shall have the authority to make all such contracts as they may deem expedient in the conduct of the business of the trust from time to time, to release, sell, exchange or otherwise dispose of at public or private sale any or all of the trust property real or person- for such prices, either in cash or the stocks, shares of securities of other corporations, trusts or associations and upon such terms as to credit or otherwise as they may deem expedient, or guarantee to assume the obligations of other corporations, trusts or associations and to enter into such agreement by way of indemnity of otherwise as they may deem expedient in connection with the acquisition of property from the subscribers as hereinbefore provided, or otherwise to confer by way of substitution such power and [fol. 74] authority in the trustees and other officers and agents appointed by them as they may deem expedient; to borrow money for the purpose of the trust and to give the obligations of the trust therefor; to loan any money without security on such terms as they may deem expedient; to submit or acquire, own or sell, or otherwise dispose of such real or personal property, including the stocks, shares and securities of any other corporation, trust or association as they may deem expedient in accordance with the purposes of this trust; to vote in person or by proxy on all shares of stock at any time held by them and to collect and receive the income, interest and profits of any such stock or securities; to collect, sue for, receive and receipt for all sums of money at any time becoming due to said trust; to

employ counsel to prosecute, to defend, to settle suits at law and in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust, and in general to do all such matters or things as in their judgment would promote or advance the business which they are authorized to carry on, although such matters and things may be neither specifically authorized nor incident to any matters or things specifically authorized.

The certificate holders shall be entitled to receive their proportionate share of the profits or income of the trust or its assets upon liquidation. The legal title to said trust estate shall be vested in said trustees and said certificates shall be personal property of the owner hereof, as shown by the books of the trustees and neither said owner nor his heir or personal representatives at his death shall have [fol. 75] any legal right to said estate or any part thereof, or interest therein or the right to partition the same or to an accounting but only to receive the income or proceeds thereof.

Before payment of any dividends, or any distribution of profits there shall be set aside out of the net income of the estate such sums as the trustees from time to time may deem a proper reserve fund to meeting contingencies or to repair, maintain or extend the property of the estate, for any purpose which the trustees may think will promote the best interests of the estate.

Such trustees shall make and execute by-laws if deemed necessary governing their actions as such in the management and control of said estate provided they shall not be inconsistent with the specific provisions herein set out.

The trustee shall have no power to bind the shareholders personally; and neither the trustees nor the shareholders, present or future, shall be held personally liable for any debt incurred or any other form of liability on behalf of said trust estate, or their agents or representatives; it being the purpose of this trust estate to vest the full and absolute control of the trust properties in said trustees, and to exempt them and the holders of beneficial interests herein from all manner of personal liability connected with or incurred by their trustees on behalf of this estate.

In all matters affecting this trust or its properties it shall require the concurrence of a majority of the trustees and in all contracts, assignments or conveyances the signature of a majority of the trustees shall bind this trust estate the same as if such instrument should be executed by all the trustees.

[fol. 76]

## Article II

Section 1. The authorized capital of this trust estate shall be Two Hundred Fifty Thousand (250,000) Dollars, and shall be divided into 250,000 beneficial interest shares of the par value of one (1) Dollar each; such interest to be evidenced by certificates in the form and transferable in the manner to be provided by the trustees. The Trustees shall have the right by amendment to increase the capital stock of this trust estate to any amount deemed advisable at any time.

The owners and holders of beneficial interest certificates, or shareholders, shall have no right to the trust property, and the ownership of the shares or interests hereunder shall not entitle the owners thereof to any title in or to the trust property nor shall they have the right to call for a dividend or partition thereof, nor for a dissolution of this trust, nor for an accounting but the shares issued hereunder, and evidenced by said certificates shall be personal property, giving only the right to share in the final distribution of the proceeds of the sale of the trust properties, as above provided.

The death insolvency or bankruptcy of any shareholder, the transfer of his interest of sale, gift or devise during the continuance of this trust shall not operate as a dissolution of this trust, nor shall it have any effect upon the business of this trust, but the heirs, assigns or representatives of such shareholder shall succeed only to the rights of the original holder of such certificates as herein set forth.

[fol. 77]

### Article III—Miscellaneous Provisions

Section 1. (a) This trust shall continue and remain in force for the term of twenty-one years after the death of the last survivor of the trustees whose names are signed hereto, unless the same have been sooner terminated as herein provided. It is agreed that said trustees may if it seems to them judicious so to do, convey the trust property to new or other trustees or otherwise dispose of same or terminate this trust as in their opinion the interest of the certificate holders may demand, being first duly indemnified *doe* any outstanding obligations.

(b) Upon the termination of this trust in any manner the trustee shall at once proceed to liquidate and realize into money all the assets of said estate, and after paying all expenses and indebtedness thereof, and charges against the sale, and after setting aside all such sums as may be necessary, to protect the said trustees or certificate holders, or the said trust estate against liability for any pending or unsatisfied notions, demands or claims, they shall distribute the residue pro rata among the certificate holders and that thereupon said trust shall cease and terminate, and said trustee shall not be required to finally wind up, liquidate or distribute all the assets of the said trust estate until the full discharge and payment of every expense, indebtedness or liability of the said estate whether direct or contingent.

(c) The principal place of business in which the affairs of said estate shall be transacted shall be at a place designated by the trustees [fol. 78] by resolution recorded in their minutes, but the business of the said trust estate may be carried on at any other place or places which in the discretion of the trustees shall be deemed proper.

(d) The Trustees shall receive as compensation for their services such sums of money as they may by resolution deem proper, to be recorded in their minutes provided for, or in lieu of any stipulated

compensation they may receive ten per cent of the income derived from oil runs or from the sale of property.

Section 2. The Trustees shall have the right and power to sell beneficial interests in this estate at whatever price they may deem proper.

Section 3. The Trustees hereby *create* for and in consideration of the transfer to this trust estate of the oil and gas leases and assignments and agreement to drill ten wells provided for in the contract above referred to with H. H. Schwarz, Abe Lebenson, and Charles Sherwin, shall execute and deliver to the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, the total of 250,000 beneficial interests shares in this trust estate, of the par value of One (1) Dollar each, it being understood and agreed by said trustees that said leases and assignments and agreements to drill ten wells are of a value equal to the value of said beneficial interests in this estate and all future holders of beneficial interests herein shall by the acceptance of their certificates representing their interests ratify and confirm the exchange of the capital stock of this trust estate for said contract, and hereby accept said certificate under those conditions.

Section 4. The Trustees may if they deem call a meeting of the [fol. 79] shareholders at any time by written notice mailed to the last address of the shareholder ten days before said meeting, but it is expressly understood and agreed that any shareholders attending any meeting called by the trustees shall have no voice in the management of this trust estate but shall act in an advisory capacity only.

Section 5. The Trustees shall have the right at any time when deemed advisable to change this Declaration of Trust to a corporation and incorporate same under the laws of Texas or any other state.

In witness whereof, we have hereunto subscribed our names, this the 12th day of April, A. D. 1921.

Robert A. Lee, H. H. Schwarz, Chas. Sherwin.

THE STATE OF TEXAS,  
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared Robert A. Lee, H. H. Schwarz, and Charles Sherwin, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 12th day of April, A. D. 1922.

J. F. Ball, Notary Public, Tarrant County, Texas. (L. S.)

Filed for record May 12, 1922, at 1:20 P. M. Recorded May 23, 1922, at 9:40 A. M. Bert Mynatt, County Clerk, Tarrant County, Texas. By Don McDugal, Deputy.

[fol. 80]

## GOVERNMENT'S EXHIBIT No. 4

## Declaration of Trust

## General Lee Interests to the Public

THE STATE OF TEXAS,  
County of Tarrant:

Know all men by these presents:

That we, Robert A. Lee, H. H. Schwarz and Chas. Sherwin all of the County of Tarrant and State of Texas, being the owners and holders of a certain contract made and entered into by and between ourselves and K. A. Kain, on the 3rd day of Jan. 1922, by which contract the said K. A. Kain, agree- to deliver to us assignments of oil and gas leases on three tracts of land, aggregating 200 acres, in what is called the Northwest extension of the Mexia field in Limestone and Navarro Counties, in the State of Texas, for the sum of \$25,000, to be paid as provided for in said contract; do hereby declare and agree that we will, and our successors shall, hold said contract and said assignment of said oil and gas leases, and all other funds or property at any time transferred to or acquired by the Trustees provided for herein, in trust, with the powers and subject to the conditions hereof for the benefit of all persons who may hereafter own beneficial interest in the trust estate hereby created. And we, the said Robert A. Lee, H. H. Schwarz and Chas. Sherwin, do hereby declare that we will act as Trustees for said Trust estate until the termination thereof, as herein provided, or until our successor or successors, shall have been selected and qualified, as hereinafter provided, or until our successor or successors shall have been selected and qualified, as hereinafter provided; and,

[fol. 81] Whereas, it is our intention that the said contract and oil and gas leases, or assignments thereof, above referred to shall be held by us as such Trustee, upon the trust hereinafter expressed; and it is intended to create therein a trust estate, and vest title to said properties, in said trustees, and their successors, with absolute power to manage, control, hold and dispose of the same, or any part thereof, for the purposes herein stated; and,

Whereas, it is likewise proposed that said contract and said assignments of oil and gas leases, and the proceeds and income therefrom, so held by said trustees shall be by them held in a trust capacity, as herein defined, for the benefit of the cestui que trust (who shall be trust beneficiaries only, without partnership or any other associate relation whatever); and that the rights of the beneficiaries in said trust shall be evidenced by membership certificates, and certificates of interest as herein provided, and the trust estate hereby created, and so represented by us as said trustees is to be known as "General Lee Interests,"

Now, therefore, the terms conditions and purposes under which said trust estate is created and is to be operated, is hereby declared by us to be as follows, to-wit:

That the Trustees above named, whose designation as such is hereby accepted by the execution and acknowledgment of this instrument, and the confirmation of this declaration of trust, and all amendments thereto, is and shall be ratified and confirmed by all holders of beneficial interests, and membership certificates herein by virtue of the receipt and acceptance by them of said membership certificates and certificates of beneficial interest herein, issued and to be issued as hereinafter provided; and the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, now acting and speaking as well on behalf of their successors, and in their own behalf, hereby declare to all such shareholders and members, present and future, and to all other persons interested that they and their successors will hold all such property contract and leases and assignments so held by them, or hereafter to be acquired by them, together with the proceeds thereof and the income therefrom, in trust during the period of his or their trusteeship as aforesaid, to manage, control and dispose of the same absolutely in the manner, and subject to the stipulations herein contained, and all amendments hereto. The acceptance of which trust is evidenced by the trustees by their becoming signatory hereto, and by the members and holders of beneficial interests herein is evidenced by their receipt and acceptance of membership certificates and certificates of beneficial interests herein, as hereinbefore provided for; the conditions of said Trustee being as follows:

#### Article I—Trustees

Section 1. The said Robert A. Lee, H. H. Schwarz and Chas. Sherwin, shall be Trustees of said Estate and the term of office of such trustees shall be for and during the term and continuation of this trust, as herein set forth, or until their successors shall have been selected and qualified, as herein provided.

Section 2. In case of the death, resignation, or inability to act or [fol. 83] either or any of said trustees, the remaining trustees or trustee shall have power to accept such resignation and fill the vacancy, and in such event his successor or successors shall succeed to the same rights, and powers, and be subject to the same duties and liabilities, and have the same compensation as his predecessor, and thereupon the trust estate hereby created shall immediately vest in such new trustee, together with the continuing trustees, without any further act or conveyance of any kind. In case of the death or resignation of any trustee, the remaining trustee or trustees shall have full power to manage and control this trust estate until the selection of his or their successor. In the event of the death, resignation or incapacity of any trustee who is acting as sole trustee, then any stockholder may call a meeting of the holders of beneficial interests, in this trust estate, by giving notice by mail for ten days to all shareholders of record on the books of this trust estate, at which meeting trustees may be elected to fill the vacancies.

Section 3. All investments shall be made, and all properties shall be held, managed, controlled and disposed of absolutely by said

trustees, and their successors with full discretionary authority and power as they would have if they themselves were the sole and absolute owners if the properties hereinbefore referred to, or which may hereafter be acquired under this declaration of trust, absolutely free from all limitations, save and except those specifically set forth herein; and such trustees shall have power and authority in conducting the business of this trust estate, to do all things necessary or proper to promote the purposes of this estate, and among other things the following:

[fol. 84] (a) To own and hold the contract heretofore made with K. A. Kain, and themselves as individuals, and to own and hold the leases and assignments of oil and gas leases on the three tracts of lands mentioned in said contract.

(b) To sell, convey and otherwise dispose of the leases and assignments of leases on either or all of the three tracts of land mentioned above, at such times and on such terms and for such price as they may deem proper.

(c) Upon such sale or conveyance of all of the leases or assignments of oil and gas leases belonging to this trust estate, said trustees shall thereupon terminate this trust by disbursing, to the unit holders of this trust estate their pro rata share respectively in the net proceeds of the sale of such properties.

(d) The Trustees are to receive as full compensation for their services 25% of the net profits realized from the sale of the total properties of this estate, which amount they are authorized to retain out of the money received by them for such sale.

(e) To fix and pay any salaries, wages or other compensation to any person, employee attorney, firm or corporation for services to be rendered to this trust estate; and to maintain offices for the transaction of the business of this estate.

Section 4. The Trustees shall not be personally liable for any of their acts or omissions as such trustees, nor for the act of any one employed by them.

[fol. 85] Section 5. The Trustees shall have no power to bind the shareholders personally, and neither the trustees nor shareholders, present and future shall be held personally liable for any debt incurred or any other form of liability on behalf of said trust estate; it being the purpose of this trust estate to vest the full and absolute control of the trust properties in said trustees, and to exempt them and the holders of beneficial interests herein from all manner of personal liability connected with or incurred by said trustees on behalf of this estate.

Section 6. In all matters affecting this trust estate or its properties it shall require the concurrence of any two of the trustees; and in all contracts, assignments or conveyances the signature of any

two of the trustees shall bind this trust estate the same as if such instrument should be executed by all the trustees.

## Article II—Shares and Shareholders

Section 1. The authorized capital of this trust estate shall be Twenty five Thousand Dollars (\$25,000) and shall be divided into Twelve Hundred Fifty (1,250) beneficial interest shares of the par value of twenty dollars, (\$20.00) each; such interests to be evidenced by certificates, in the form and transferrable in the manner to be provided by the Trustees.

Section 2. The owners and holders of beneficial interest certificates, or shareholders, shall have no right to the trust property, and the ownership of the shares or units hereunder shall not entitle the owners thereof, to any title in or to the trust property, nor shall they have the right to call for a division or partition thereof, nor [fol. 86] for a dissolution of this trust, nor for any accounting; but the shares issued hereunder, and evidenced by said certificates shall be personal property, giving only the right to share in the final distribution of the proceeds of the sale of the trust properties, as above provided.

Section 3. The death, insolvency or bankruptcy of any shareholder, the transfer of his interest by sale, gift or devise, during the continuance of this trust shall not operate as a dissolution of this trust nor shall it have any effect upon the business of this trust, but the heirs, assigns or representatives of such shareholders shall succeed only to the rights of the original holder of such certificate as herein set forth.

## Article III—Miscellaneous Provisions

Section 1. This Trust estate shall continue until such time, as the then Trustees shall sell and dispose of all the properties of this estate, whereupon this trust estate shall be liquidated, and its assets distributed pro rata among its then existing shareholders as above set out.

Section 2. The Trustees shall have the right and power to sell beneficial interests in this estate at whatever price they may deem proper.

Section 3. The Trustees hereby created, for and in consideration of the transfer to this trust estate of the oil and gas leases and assignments provided for in the contract above referred to with K. A. Kain, and of the payment by said Robert A. Lee, H. H. Schwarz [fol. 87] and Chas. Sherwin, of the consideration mentioned in said contract for said leases and assignments, which payment the said Robert A. Lee, H. H. Schwarz and Chas. Sherwin, agree to make in accordance with said contract; shall execute and deliver to the said Robert A. Lee, H. H. Schwarz and Chas. Sherwin, the total

of twelve hundred fifty (1,250) beneficial interests shares in this trust estate, of the par value of Twenty Dollars (\$20.00) each, it being understood and agreed by said trustees that said leases and assignments are of a value equal to the value of said beneficial interests in this estate; and all future holders of beneficial interests herein shall, by the acceptance of their certificates representing their interest, ratify and confirm the exchange of the capital stock of this trust for said leases and assignments.

Section 4. The Trustees may, if they deem best, call a meeting of shareholders at any time by written notice mailed to the last address of the shareholder ten days before such meeting.

In witness whereof, we have hereunto subscribed our names, this the 3rd day of January, A. D. 1922.

Robert A. Lee, H. H. Schwarz, Chas. Sherwin, Trustees.

THE STATE OF TEXAS,  
County of Tarrant:

Before me, F. N. Ball, a Notary Public within and for Tarrant County, State of Texas, on this day personally appeared Robert A. Lee, H. H. Schwarz and Chas. Sherwin, known to me to be the per-[fol. 88] sons whose names are subscribed to the foregoing instrument and they acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 3rd day of January, A. D. 1922.

F. N. Ball, Notary Public, Tarrant County, Texas. (L. S.)

Filed for record Jan. 21st, 1922, at 10:25 A. M. Recorded Feb. 1st, 1922, at 1:40 P. M.

Bart Mynatt, County Clerk, Tarrant County, Texas, by Estelle Hollis, Deputy.

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### GOVERNMENT'S EXHIBIT No. 3

#### Declaration of Trust

#### General Lee Interests to the Public

THE STATE OF TEXAS,  
County of Tarrant:

Know all men by these presents:

That we, Robert A. Lee, H. H. Schwarz and Charles Sherwin, all of the County of Tarrant, and State of Texas, being the owners and holders of a certain contract made and entered into by and between

ourselves and K. A. Kain, on the 4th day of February, 1922, by which contract the said K. A. Kain agrees to deliver to us assignments of oil and gas leases on these tracts of land aggregating one [fol. 89] hundred and forty acres in what is called the Northwest Extension of the Maxia Field, in Limestone County, in the State of Texas, for the sum of \$18,000.00 to be paid as provided for in said contract; do hereby declare and agree that we will, and our successors shall, hold said contract and said assignments of said oil and gas leases, and all other funds or property at any time, transferred to or acquired by the Trustees provided for herein in trust, with the powers and subject to the conditions hereof for the benefit of all persons who may hereafter own beneficial interests in the trust estate hereby created. And, we, the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, do hereby declare that we will act as trustees for said trust estate until the termination thereof, as herein provided, or until our successor or successors shall have been selected and qualified, as hereinafter provided; and

Whereas, it is our intention that the said contract and oil and gas leases, or assignments thereof, above referred to shall be held by us as such trustees, upon the trust hereinafter expressed; and it is intended to create therein a trust estate, and vest title to said properties in said trustees, and their successors, with absolute power to manage, control, hold and dispose of the same, or any part thereof for the purposes herein stated; and

Whereas, it is likewise proposed that said contract and said assignments of oil and gas leases, and the proceeds and income therefrom so held by said Trustees shall be by them held in a trust capacity as herein defined for the benefit of the cestuis que trust, (who shall be trust beneficiaries only, without partnership or any other associative [fol. 90] relation whatever), and that the right of the beneficiaries in said trust shall be evidenced by membership certificates, and certificates of interest as herein provided, and the trust estate hereby created, and so represented by us as said trustees is to be known as "General Lee Interests."

Now, therefore, the terms, conditions and purposes under which said trust estate is created and is to be operated, is hereby declared by us to be as follows, to-wit:

That the Trustees above named, whose designation as such, is hereby accepted by the execution and acknowledgment of this instrument, and the confirmation of this declaration of trust, and all amendments hereto, is and shall be ratified and confirmed by all holders of beneficial interests, and membership certificates herein, by virtue of the receipt and acceptance by them of said membership certificates and certificates of beneficial interests herein issued and to be issued as hereinafter provided; and the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, now acting and speaking as well on behalf of their successors and in their own behalf hereby declare to all such shareholders and members, present and future, and to all other persons interested, that they and their successors will hold all such property, contract and leases and assignments, so held by them,

or hereafter to be acquired by them, together with the proceeds thereof and the income therefrom, in trust during the period of his or their trusteeship as aforesaid, to manage, control and dispose of the same absolutely in the manner, and subject to the stipulations herein contained and all amendments hereto. The Acceptance of which trust is evidenced by the trustees by their becoming signatory hereto, and by the members and holders of beneficial interests herein [fol. 91] is evidenced by their receipt and acceptance of membership certificates and certificates of beneficial interests herein, as hereinafter provided for; the conditions of said trust being as follows:

#### Article I—Trustees

Section 1. The said Robert A. Lee, H. H. Schwarz and Charles Sherwin, shall be trustees of said estate and the term of office of such trustees, shall be for and during the term and continuation of this trust, and herein set forth, or until their successors shall have been selected and qualified, as herein provided.

Section 2. In case of the death, resignation or inability to act of either or any of said Trustees, the remaining trustees or trustee shall have power to accept such resignation and fill the vacancy, and in such event his successor or successors shall succeed to the same rights and powers, and be subject to the same duties and liabilities, and have the same compensation as his predecessor; and there upon the trust estate hereby created shall immediately vest in such new trustee, together with the continuing trustees without any further act or conveyance or any kind. In case of the death or resignation of any trustee, the remaining trustee or trustees shall have full power to manage and control this trust estate until the selection of his or their successor. In the event of the death, resignation or incapacity of any trustee who is acting as sole trustee, then any stockholder may call a meeting of the holders of beneficial interests in this trust estate, by giving notice by mail for ten days to all shareholders of record on the books of this trust estate, at which meeting trustees may be elected to fill vacancies.

[fol. 92] Section 3. All investments shall be made, and all property shall be held, managed, controlled and disposed of absolutely by said Trustees, and their successors, with full discretionary authority and power as they would have if they themselves were the sole and absolute owners of the properties herein before referred to, on which may hereafter be acquired under this declaration of trust, absolutely free from all limitations, save and except those specifically set forth herein; and such trustees shall have power and authority in conducting the business of this trust estate to do all things necessary or proper to promote the purposes of this estate, and among other things the following:

(a) To own and hold the contract heretofore made with K. A. Kain and themselves as individuals; and to own and hold the leases

and assignments of oil and *has* leases on the three tracts of lands, mentioned in said contract.

(b) To sell, convey or otherwise dispose of the leases and assignments of leases on either or all of the three tracts of land mentioned above, at such times, and on such terms and for such price as they may deem proper.

(c) Upon such sale or conveyance of all of the leases or assignments of oil and gas leases belonging to this trust estate, said trustees, shall thereupon terminate this trust by disbursing to the unit holders of this trust estate this pro rata share, respectively in the net proceeds of the sale of such properties.

(d) The trustees are to receive as full compensation for their services twenty five (25%) per cent of the net profits realized from the [fol. 93] sale of the total properties of this estate, which amount they are authorized to retain out of the money received by them from such sales.

(e) To fix and pay any salaries, wages or other compensation to any person, employee, attorney, firm or corporation, for services to be rendered to this trust estate; and to maintain offices for the transaction of the business of this estate.

Section 4. The Trustees shall not be personally liable for any of their acts or omissions as such trustees, nor for the acts of any one employed by them.

Section 5. The trustees shall have no power to bind the shareholders personally; and neither the trustees nor shareholders present or future, shall be held personally liable for any debt incurred or any other form of liability on behalf of said trust estate; it being the purpose of this trust estate to vest the full and absolute control of the trust properties in said trustees, and to exempt them and the holders of beneficial interests herein from all manner of personal liability connected with or incurred by said trustees on behalf of this estate.

Section 6. In all matters effecting this trust estate or its properties it shall require the concurrence of any two of the Trustees; and in all contracts assignments or conveyances the signature of any two of the trustees shall bind this trust estate the same as if such instrument shall be executed by all the trustees.

[fol. 94]

## Article II—Shares and Shareholders

Section 1. The authorized capital of this trust estate shall be \$18,000.00 and shall be divided into nine hundred beneficial interests shares of the par value of \$20.00 each; such interests to be evidenced by certificates, in the form and transferrable in the manner to be provided by the trustees.

Section 2. The owners and holders of beneficial interest certificates or shareholders, shall have no right to the trust property, and the

ownership of the shares, or units hereunder shall not entitle the owners thereof to any title in or to the trust property, nor shall they have the right to call for a division or partition thereof, nor for a dissolution of this trust nor for an accounting, but the shares issued hereunder, and evidenced by said certificates shall be personal property, giving only the right to share in the final distribution of the proceeds of the sale of the trust properties, as above provided.

Section 3. The death, insolvency or bankruptcy of any shareholder, the transfer of his interest by sale, gift or devise during the continuance of this trust shall not operate as a dissolution of this trust, nor shall it have any effect upon the business of this trust, but the heirs, assigns, or representatives of such shareholders shall succeed only to the rights of the original holder of such certificates as herein set forth.

### Article III—Miscellaneous Provisions

Section 1. This trust estate shall continue until such time as the then trustees shall sell and dispose of all the properties of this estate; [fol. 95] thereupon this trust estate shall be liquidated, and its assets distributed pro rata among its then existing shareholders as above set out.

Section 2. The trustees shall have the right and power to sell beneficial interests in this estate at whatever price they may deem proper.

Section 3. The trustees hereby created, for and in consideration of the transfer to this trust estate of the oil and gas leases and assignments provided for in the contract above referred to with K. A. Kain and of the payment by said Robert A. Lee, H. H. Schwarz and Charles Sherwin, of the consideration mentioned in contract for said leases and assignments, which payment the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, agree to make in accordance with said contract; shall execute and deliver to the said Robert A. Lee, H. H. Schwarz and Charles Sherwin, the total of nine hundred beneficial interests shares in this trust estate, of the par value of \$20.00 each; it being understood and agreed by said trustees that said leases and assignments are of a value equal to the value of said beneficial interests in this estate; and all future holders of beneficial interests herein, shall, by the acceptance of their certificates representing their interests ratify and confirm the exchange of the capital stock of this trust estate for said leases and assignments.

Section 4. The trustees may if they deem best, call a meeting of shareholders at any time by written notice mailed to the last address of the shareholders ten days before such meetings.

[fol. 96] In witness whereof, we have hereunto subscribed our names, this the 9th day of February, A. D. 1922.

Robert A. Lee, H. H. Schwarz, Chas. Sherwin, Trustees.

THE STATE OF TEXAS,  
County of Tarrant:

Before me, F. N. Ball, a Notary Public within and for Tarrant County, State of Texas, on this day personally appeared Robert A. Lee, H. H. Schwarz and Charles Sherwin known to me to be the persons whose names are subscribed to the foregoing instrument and they acknowledged to me that they executed the same for the consideration and purposes therein expressed.

Given under my hand and seal of office, this the 9th day of February, A. D. 1923.

F. N. Ball, Notary Public, Tarrant County, Texas. (L. S.)

Filed for record Mar. 8, 1922, 2:05 P. M. Recorded Mar. 22nd, 1922, at 1:15 P. M. Bart Mynatt, County Clerk, Tarrant County, Texas, by Estelle Hollis, Deputy.

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GOVERNMENT EXHIBIT

And be it further remembered, that the following contract was introduced by the Government upon the trial of this cause, upon the merits, which said contract was and is as follows:

[fol. 97] "This contract and agreement, made and entered into on this 12th day of April A. D. 1922, by and between the General Lee Development Interests, acting by and through its duly authorized trustees Robert A. Lee, H. H. Schwarz and Charles Sherwin, as parties of the first part, and H. H. Schwarz, Charles Sherwin and Abe Lebenson as parties of the second part, witnesseth:

Whereas, the parties of the first part have organized and are organizing an oil company operating under a declaration of trust dated this 12th day of April, A. D. 1922, said declaration of trust to be filed in the deed records of Tarrant County, Texas, and are desirous of obtaining certain properties, rights and other considerations, more specifically stated herein, and whereas, the parties of the second part agree to furnish the necessary properties, rights and considerations; Now, therefore, it is hereby mutually agreed by and between the parties hereto as follows:

Whereas, the said Abe Lebenson has heretofore furnished to the other parties of the second part, certain sums of money, and is to furnish other sums of money, the total amount of such sums of money so furnished and to be furnished, aggregating the sum of Ten Thousand (\$10,000.00) Dollars, and in consideration of having furnished to the said H. H. Schwarz and Charles Sherwin as parties of the second part such money, and agreeing to furnish the remainder of such amount, said Abe Lebenson is to have a beneficial interest in this contract as security for the repayment of said sum and interest thereon. In order to protect himself and to secure the

repayment to him of the above money advanced and to be advanced to the said H. H. Schwarz and Charles Sherwin, the said Abe Leben- [fol. 98] son is to have the right to have any lease, leases or other contracts provided for in this agreement taken in his name, to be held by him as security; and the said Abe Leben-son is to receive the money derived from the sale of stock or certificates of beneficial interest in the General Lee Development Interests to be issued to the parties of the first part as hereinafter provided; and until the above sum of money is repaid to the said Abe Leben-son, he shall counter-sign all checks, distributing any of the funds received by the parties of the first part from the sale of any units of said stock. It is further understood and agreed that the said H. H. Schwarz and Charles Sherwin, as the other parties of the second part, are to hold the said Abe Leben-son harmless by reason of any of the conditions of this contract; it being understood and agreed that the said Abe Leben-son does not assume any of the obligations of this contract except to advance to said H. H. Schwarz and Charles Sherwin the remainder of the money above referred to. Upon the repayment to the said Abe Leben-son of the sum of money advanced and to be advanced, and interest as above set out, he is to release all rights hereunder to the other parties of the second part, the said Abe Leben-son is made a party hereto merely for the purpose of securing him in the repayment of said sum of money advanced and to be advanced as herein set forth, to the other parties of the second part, and has no further interest or liability in the subject matter of this contract.

As a further consideration, the parties of the second part have under option a drilling contract from H. W. Jenkins of Roanoke, Texas, as party of the first part, and themselves as parties of the second part, under which contract the parties of the second part [fol. 99] agree to drill a test well to a depth of Thirty Five Hundred (3,500) feet, unless oil or gas in paying quantities is found at a lesser depth, and under which contract the said party of the first part agrees to release unto the parties of the second part, or their assigns, certain blocks of acreage, upon the well being drilled to certain levels, and whereas, the parties of the second part, under this contract, agree to assign to the General Lee Development Interests, or parties of the first part, Sixty One Hundred and Sixty Three (6,163) acres, more or less, out of certain surveys to be selected by the said H. H. Schwarz and Charles Sherwin, as follows; when the well to be drilled on the J. N. Lee Tract, or any other tract selected by the parties of the first part, shall have reached a depth of Two Thousand (2,000) feet, the parties of the second part agree to assign to the General Lee Development Interests Thirty Eight Hundred and Sixty Eight (3,868) acres, more or less; when the well shall have reached a depth of Three Thousand (3,000) feet, parties of the second part agree to assign to the General Lee Development Interests Eight Hundred and Four (804) acres more or less; when the well shall have reached a depth of Thirty Five Hundred (3,500) feet, parties of the second part agree to assign to the General Lee Development Interests, Fourteen Hundred and Ninety Seven (1,497) acres, more or less. It is, however, understood and agreed, that in

the event a well producing oil or gas in paying quantities is brought in on this tract before the said well shall have been drilled to a depth of Thirty Five Hundred (3,500) feet, then both blocks of acreage to be assigned to the parties of the first part at the Three Thousand (3,000) foot and Thirty Five Hundred (3,500) foot level shall then become due to the parties of the first part, and the parties of the second part agree to make such assignments at that time.

[fol. 100] H. H. Schwarz and Charles Sherwin, as parties of the second part, agree to furnish to the parties of the first part the necessary funds for the drilling of said test well to a depth of Thirty Five Hundred (3,500) feet, unless oil or gas in paying quantities is found at a lesser depth.

H. H. Schwarz and Charles Sherwin, as parties of the second part, for the consideration hereinafter set forth further agree to furnish to the parties of the first part either interest in wells drilling or to be drilled, or to drill Nine (9) shallow or deep wells at their option on such acreage and in such fields as they may select; in the event that the parties of the second part decide to furnish to the parties of the first part Nine (9) shallow wells, it is understood and agreed by and between the parties hereto that they may drill the said Nine (9) wells in any shallow field or fields that they may select to a depth that shallow oil or gas is usually found in such fields, and in the event that no oil or gas is found in these wells, drill to the usual depth, then it shall be considered by and between the parties hereto that the parties of the second part have fully complied with their contract by drilling said wells to said depth.

And whereas, the parties of the first part, under their plan of organization, have guaranteed to get production for their stockholders or purchasers of beneficial interest shares in the General Lee Development Interests, it is further understood and agreed by and between the parties hereto, that the parties of the second part will purchase and furnish to the parties of the first part an interest in a producing well or wells, the amount of such interest to be determined by the parties of the second part, in the event that production is not [fol. 101] obtained in any one of the wells drilled.

And whereas, the parties of the first are now organizing an oil company to be known as the General Lee Development Interests with Robert A. Lee, H. H. Schwarz and Charles Sherwin as trustees, and whereas the said oil company is capitalized at Two Hundred and Fifty Thousand (\$250,000.00) Dollars, with beneficial interest shares of the par value of One Dollar (\$1.00) each, and whereas, the said H. H. Schwarz and Charles Sherwin have contracted and employed said Robert A. Lee to perform such duties in connection with said oil company, said contract being in words and figures as follows:

"STATE OF TEXAS,  
County of Tarrant:

This contract and agreement, made and entered into on this 6th day of April, A. D. 1922, between Charles Sherwin and H. H.

Schwarz, hereinafter called parties of the first part, and Robert A. Lee, hereinafter called party of the second part.

Witnesseth, that whereas, parties of the first part are interested in the organization and promotion of a development company for the purpose of buying oil and gas leases and drilling wells and selling interests in the company being organized, said company to be known as the General Lee Development Interests and for such purpose desires to engage the services of the party of the second part, and the party of the second part desires to accept such employment.

It is therefore mutually agreed as follows, to-wit: Parties of the [fol. 102] first part hereby agree to employ the party of the second part to act as geologist for the above named Interests and for his services hereby agree to pay to the said party of the second part, ten (10) per cent of all the net profits earned and collected by the said Interests after all properties are fully paid for. Said ten (10) per cent of such profits to be paid to the party of the second part at the time and in the manner that other profits are paid out and distributed and in addition thereto to pay to party of the second part the sum of Fifty Dollars (\$50.00) per month to be a drawing account.

For the consideration above named, the party of the second part hereby agrees to accept said employment and to devote his entire time and attention to the business of said Interests as required, as geologist and for such other services in connection therewith as are reasonable and to assist in all proper ways to promote the Interests of General Lee Development Interests; it being expressly agreed that parties of the first part are to have the exclusive right and authority to use the name of the party of the second part in all advertising matter, prospectus letters and other papers, and in all legitimate ways to advertise the connection of the party of the second part with said Interests and during the term of this contract party of the second part is not to permit the use of his name by any other person, firm, corporation or syndicate.

It is further specifically agreed that this contract shall be and remain in full force and effect for a period of six (6) months from and after the date above named. It is further agreed that neither parties hereto shall have the right to terminate this contract without first having given written notice to the party for a period of sixty days.

[fol. 103] In witness hereof, we have hereunto signed our names the day and date first above written.

(Signed) H. H. Schwarz, Chas. Sherwin, Robert A. Lee.

Witness: Stanley Edwards, Carl A. Battles.

Now, therefore, it is mutually agreed by and between all parties hereto that a certificate or certificates representing and conveying the said Two Hundred and Fifty Thousand (\$250,000) beneficial interest shares of the par value of One Dollar (\$1.00) each, shall be issued to Robert A. Lee, H. H. Schwarz and Charles Sherwin, but that under and by virtue of the contract herein set out between

the said Robert A. Lee and the said Schwarz and Sherwin, the said Robert A. Lee shall have no right to, nor ownership in the beneficial interest shares in the General Lee Development Interests, and the said certificate or certificates and the interests conveyed thereby shall be and become the sole property of the said Schwarz and Sherwin, it being understood and agreed that the said H. H. Schwarz and Charles Sherwin are to carry out the terms and conditions of the contract heretofore made between them and the said Robert A. Lee out of the proceeds from the sale of any or all of the beneficial interests represented by said certificate or certificates.

And whereas, it is agreed and understood by the parties hereto that in order for the parties of the second part to be able to comply with all the covenants and agreements above set forth, they may have [fol. 104] to sell or dispose of a portion, or all, of the beneficial interest shares represented by the certificate or certificates of the capital stock of the General Lee Development Interests; now, therefore, it is further agreed, that as a part of the consideration for the agreements heretofore made herein between the parties hereto that the said H. H. Schwarz and Charles Sherwin are to have the right in the sale and disposition of the said beneficial interest shares to sell the same under the name of and by the authority of Robert A. Lee, or both, but that in the sale and disposition of said interests or shares as above set forth, neither the General Lee Development Interests, nor Robert A. Lee, shall have any pecuniary interest. The expense of making such sales to be advanced by the said H. H. Schwarz and Charles Sherwin.

As a further consideration for the compliance with the terms of this contract on the part of the parties of the second part, the said Robert A. Lee has agreed and does hereby agree that he will continue to assist the said H. H. Schwarz and Charles Sherwin in the sale and disposition of the said beneficial interest shares by contributing to their efforts, his time, services, influence and use of his name, until such time as this contract has been fully carried out and performed; and the said Robert A. Lee agrees to sign any certificate of beneficial interest, and to make such transfers out of said certificate or certificates covering the said Two Hundred and Fifty Thousand (250,000) shares as may be required of him so to do by the said H. H. Schwarz and Charles Sherwin.

And whereas, under said contract between Robert A. Lee and the [fol. 105] said H. H. Schwarz and Charles Sherwin, it was contemplated and understood that the name of Robert A. Lee had and has a certain trade value, now, therefore, it is mutually agreed by and between all parties hereto, that in all advertising both newspaper, circularizing and personal letters, the name of Robert A. Lee may be used as trustee of the General Lee Development Interests.

In witness whereof, we have hereunto signed our names the day and year first above written.

General Lee Development Interests, Robert A. Lee, Trustee;  
H. H. Schwarz, Trustee; Charles Sherwin, Trustee, Parties  
of the First Part. H. H. Schwarz, Chas. Sherwin, Abe  
Lebenson, Parties of the Second Part.

And be it remembered, that the defendant, Charles Sherwin, in support of said plea of immunity, further testified:

"The three declarations of trust just introduced were recorded in the records of deeds, Tarrant County, Texas. Our list of stockholders was kept in our stock ledger. No one had a list of our stockholders save and except us and our companies, and no one had a copy of the contract between Mr. Schwarz and myself (Sherwin) on the one hand, and Mr. Lee upon the other. That document was not recorded. He (Southworth) inquired into the date of incorporation, and we answered every question and he put down the answers to each and every question on the questionnaire. I am certain we answered every question and I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. Our answers were made truthfully—they spoke the truth. We furnished him (Southworth) a true list of the stockholders that he demanded, and their addresses. I gave him information concerning the plan of operation of the three companies, and made out separate questionnaires for each company, that is, the General Lee Interests, General Lee Interests No. Two, and the General Lee Development Interests, of which Mr. Schwarz and myself (Sherwin) were trustees;" and

Be it further remembered, that the said Charles Sherwin, upon cross examination by Mr. Cahill, testified as follows:

"My reply to the questionnaire was not sworn to. None of my replies were sworn to, and I never testified under oath as to any of these facts. There was a hearing held just before Mr. Southworth—I mean by hearing before him (Southworth) his visit and talk to us. There was a regular hearing. I know this because questions were made and answered at our office.

Our evidence was not taken down by a stenographer. We were not just talking to Mr. Southworth and having a conversation with him about those things, we were answering questions that were put to us. Records were made of the answers given, right then by Mr. Southworth, and Mr. Schwarz and myself. These records have been returned to the Federal Trades Commission. I have no private [fol. 107] memorandum of it. It was answered in that questionnaire, that is what I mean. When we started to answer his (Southworth's) questions, we did not decline to answer any of them upon the ground that they might tend to incriminate us, but we refused to answer any question before he made his appearance, and after his first appearance at our office. We refused to answer the questionnaire that was mailed to us, and ignored it. The declarations of trust were on file here in Tarrant County at the time we furnished copies to the Federal Trade Commission. The information we furnished Southworth outside of the declarations of trust, were contracts—every contract we had in the office, drilling contracts and contracts for leases and contract with General Lee. No other person had copies of those contracts, except the drilling contractors who had

copies. I do not believe the parties from whom we secured the lease had copies. I have searched my memory and I would have no way of telling at this time whether the other parties with whom these leases were made had copies. The leases were recorded. In addition to this, I gave Southworth the addresses of the largest stockholders we had at that time. We let him make notes from correspondence which he wanted to read, and this correspondence related to the purchase of interests by some of our stockholders who had already purchased stock. In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed him (Southworth) other letters in which complaints were made that had not been adjusted. He specifically called for those letters. He must have known that there were complaints from the [fol. 108] stockholders in our files, because he asked for letters on them. He did not mention the names of the stockholders who had specifically complained, but he wanted letters containing complaints if any we had at that time. My attorney was not present at this time, and I had not previously consulted him with reference to this question. I had consulted him with reference to whether or not we would answer the questionnaires. With respect to the questionnaires, I answered that we gave him (Southworth) the name of our company and the date of its formation and incorporation, and those facts were already a public record. The other questions related to the State of Incorporation, the Statutory office, principal business office; the fourth question relates to the place of business, and that was shown in the declaration of trust. I do not have a copy of our reply to this questionnaire at this time. I have been looking for all of those records but we have moved several times, and I have not been able to find it. I have been looking for a copy of these answers but I do not remember whether we kept one or not. I have not yet found our replies to the questionnaires.

In answer to the sixth question, we answered, that our company was authorized to do business in no State other than Texas.

To the seventh question we answered, that our company was not authorized to sell stock or securities in any State other than Texas.

The eighth question stated the amount of our preferred and common stock authorized to be \$250,000.00 of the par value of \$1.00. This was also shown by the declaration of trust.

The ninth question showed the amount of preferred and common stock issued.

The tenth question and answer showed the amount of preferred and common stock the companies intended to issue. This was [fol. 109] shown in our declaration of trust also.

The answer to the eleventh question shows the promoters and organizers to be: Robert A. Lee, H. H. Schwarz and Charles Sherwin; this was shown by the declaration of trust.

The answer to question twelve, advised him (Southworth) and the Federal Trades Commission of the previous business connections of the promoters and organizers, and I gave them a brief description

of what business we (the organizers and promoters) had been in before. I believe we covered the period of six or seven years in giving this information, and this information showed that we had been engaged in legitimate business.

The answer to the thirteenth question stated that no compensation or profit was received by the promoters and organizers.

The fourteenth question was: "Annex copies of all promoters' agreements and proposals." Our reply thereto was, we furnished him the contracts for the drilling of the wells, and the contract for the acreage, and the contract with Robert A. Lee. The Robert A. Lee contract covered the entire organization, and how it was to be operated and carried on. Briefly it provided for the drilling of ten wells; for the exchange of the capital stock in the General Lee Development Interests, and the form in which we were to sell these interests. This is the contract with respect to the third company, that is, the company known as the General Lee Development Interests.

[fol. 110] The contract provided for compensation to General Robert A. Lee, and in which contract it was stated that the compensation of Robert A. Lee was to be Fifty (\$50.00) Dollars per month, and ten per cent (10%) of any production obtained. The ten wells were to be drilled or acquired, and we gave them this information. At the same time, in response to their demand, we gave them (Southworth) other literature—Yes, all the literature we had issued, prospectuses, letters, booklets, etc. Some of these things were such that we had kept hidden. I can specifically state what ones—some particular form letters that we had. Copies of these had been sent out to purchasers of interests. Not a very great number of purchasers, probably several hundred. They were not published anywhere in newspapers or places like that.

In reply to the fifteenth question, we gave them the information as to how much stock was issued on the organization of the company, the same being \$250,000.00, the total amount of capital. We told them (Southworth) that the stock was issued to Lee, Schwarz and Sherwin, for the consideration of the contracts, which was in pursuance of the agreement with R. A. Lee.

The seventeenth question, asking the amount of stock issued to promoters, organizers, etc., for patents, inventions, good-will, land, leases, etc., was covered in the contracts already given to him.

The Eighteenth question asking for appraisal value of any item mentioned in question seventeen was answered by our stating that this was answered in the contracts.

To the nineteenth question we answered—That no bonds, debentures and secured obligations have been issued.

[fol. 111] To the Twentieth question, we answered—That no bonds, debentures and secured obligations were proposed to be purchased by the Company.

To question Twenty-one, we answered—That our companies were not the result of any consolidation, merger or reorganization.

To question Twenty-two, we answered—That no subsidiary are controlled by stock ownership or otherwise by us.

Question Twenty-three, asked for the name and address of each officer, director, promoter and organizer who has been or is now connected with, or interested in the company, with their experience and qualifications for present positions. That was answered: R. A. Lee, Fort Worth; Harry H. Schwartz, Fort Worth, and Charles Sherwin, Fort Worth, Texas. I do not believe anything was said in this answer about our qualifications and experience, as I believe it had been answered before that. I believe there was a question previous to that (23), which asked us to give him the previous business experience of the trustees, and I do not recall just how that question was answered, but we gave him a list of legitimate employment.

In answer to question Twenty-four which asked for the names and addresses of the seven largest stockholders; the number of shares held by or issued to each, the consideration paid by them respectively, we gave the names and addresses, and the amounts owned, and the consideration, which was par value. I do not recall the names given, but they were legitimate names and addresses.

[fol. 112] We answered in reply to question twenty-five that no stock had been donated to the Treasury.

Questions 26 to 29 inclusive, were under the head of business. No. 26 asked us to describe briefly, the business purposes and object of the company; where it was to be conducted, the facilities and plant available therefor, and I do not recall exactly how that question was answered, but I know we answered it. That the purpose was to drill ten wells, and I believe we stated substantially, the purposes of the business as was set out in the declaration of trust. I believe we stated the office to be at Fort Worth, with one well now drilling, and gave the depth of that well. I do not recollect the answer with respect to the facilities of the plant, but I believe we covered every question pretty thoroughly.

Question 27 was: "When did the Company commence business, the amount of capital stock paid up at the commencement of business?" And we answered: "April 12th, 1922, as the date when the declaration of trust was either filed or executed, and as the commencement of business, and that there was no capital stock paid up at the commencement of business."

The answer to question 27 answered question 28.

In answer to question 29, we stated—that the company has not taken over any existing business.

Question 30, was as follows: "What is the company's immediate plan of action?" What amount of money will be necessary to accomplish it; how is it proposed to raise this money; what stock or securities are to be sold therefor, or have been sold, and on what basis?" And we answered—that the company's immediate plan of action was to complete a well then drilling, and drill additional wells as fast as possible until the contract calling for ten wells had been [fol. 113] complied with, substantially the same as proposed in the declaration of trust, and all the literature sent out. I do not believe I stated the amount of money this plan would necessitate at that time. We stated that we proposed to raise the money from the sale of the interests (stock). We further answered that the stock or securities to

be sold and have been sold were stocks belonging to the trustees, that is, the capital stock, the full amount, and on the basis of par value.

Question 31 is as follows: "Does the company sell or propose to sell its stock direct, or through others—state who?" And I answered—that the company was not selling its own stock, but was selling stock that belonged to the trustees, the company had no stock for sale, and I do not believe that I particularly answered whether the stock was to be sold through others or direct, although I did go into the method of the disposal of the stock in some question or in some explanation.

Question 32 required us to give the names and addresses of all stock or securities sales agents or representatives now in the field, and that is where I answered the question that we had some Chicago Brokerage house handling some of the stock for us, and I believe I gave the name of Leslie Vincent & Company.

Question No. 33 required us to state how much has been paid to date as commission, bonuses or salaries to stock salesmen, and I believe I answered by saying—None by the Company. Leslie Vincent & Company did not make sales to a number of purchasers of stock under their own name. In most instances to the best of my recollection and knowledge, they did not use their own name. They were under no instructions with respect to this whatever. I did not see any correspondence that was sent out, or letter-heads of the Leslie Vincent Company in connection with the sale of stock in the [fol. 114] General Lee Companies. They had letter-heads and wrote to us on their own letter-heads. I do not know whether they had business cards or not.

Question 34 is: "How much has been spent to date for advertising, in connection with the sale of stock?—and I believe I answered—that none had been spent by the company. The questions in the questionnaires were the same in each instance, that is, with respect to each of the three companies, and the answers thereto were substantially the same. In the instances concerning the amount spent to date for advertising in connection with the sale of stock, our answer was—none in each instance. I would sometimes vary in stating the amount of capital stock and price, but as to those general questions, the answers were practically the same.

Question 35 is: "State the compensation, commission or bonuses paid to stock salesmen, the discount and profit to each? to which I answered—None by the Company.

Question No. 36 is: "Has stock been sold or ap-portioned en block to any promoter, broker, or fiscal agent?" This question was answered by stating that the company had not accepted any notes in payment for stock said to promoters, brokers or fiscal agents.

Question 38 is: "At what price are company stock or securities to be sold?" And I don't recall just how I answered that. I don't know whether I stated that it was to be sold at the option of the trustees, or whether I said par value.

Question 39 is: "What percentage of the gross proceeds thereof are to be paid by the company?" And I answered—None.

Question 40 is: "Have the stocks or securities which company

[fol. 115] proposes to sell, been underwritten, and on what basis, or is company otherwise assured that all of the funds needed will be obtained?" And I believe I answered that by saying—This stock was traded for the leases and contracts, but I do not recall how stated the company was assured that all of the funds needed would be obtained, but I believe I did give some answer to that question.

Question 41, is: "To what extent are subscriptions to be made, conditional on obtaining total subscriptions or a given amount, and to what amount?" And I believe that was answered—"To no extent."

Question 42 is: "Annex copies of all literature, advertisements, prospectuses and circulars used in the furtherance of the sale of stock and securities by company or others? And any instructions to stock salesmen?"

I have previously answered that,—I gave them literature and form letters. The literature was being used in campaign for the sale of stock, and advertisements were in oil papers or daily papers, and the prospectuses were sent to persons solicited for the purchase of stock, but there are some letters that were not—they were sent out to all stockholders, and were letters that we would in every case send to some stockholder, that is, in every case where that form seemed to be appropriate for the exigency that had developed.

Question 43 is: "Describe accurately but briefly the properties acquired, real and personal, with all improvements or plants now on or to be placed thereon; the amount paid or to be paid in money, stock, bonds, securities or otherwise therefor, and the actual value of each portion or parcel thereof?" I answered that by giving copies of each individual lease that we had at that time assigned to the General Lee Development Interests, which leases were recorded in some public office. I told them of the physical properties, drilling [fol. 116] well; the structure, and in addition to telling them, I took Mr. Southworth up to see the properties. As to the amount paid, I believe I just gave what I considered the potential values under certain considerations and certain conditions.

Question 44 is: "Give similar description of property or properties which the company has contracted to acquire or intends to acquire?" And I answered by stating that — *was* some conditional leases, and I gave them copies of them.

Question 45, with respect to financial conditions is: "Annex trial balance, last balance sheet, or balance sheet prepared for the purpose of this report; profit and loss accounts?" And I answered by giving this. The bookkeeper took care of that for us. I filed an income report for the General Lee Development interests, but not on the other two.

Question 46 is: "As to the assets enumerated therein, describe briefly each item, state the actual cost, or present actual value thereof, with appraisal by disinterested appraisers?" And I believe we answered by saying—"We had no appraisal made."

Question 47 is: "If the company is mining or oil company, furnish full report of its properties, acreage, or leases?" Our answer to this—I just gave them what we had previously given them.

Question 48 is: "Give the gross income from operations or production during the preceding twelve months?" And I answered: "None."

Question 49 is: "State any existing facts or probable development concerning your company, its officers, directors, managers, promoters or representatives; properties, business or prospects, which have not been covered by preceding questions, but which should be known to an investor?" And I do not recall just what information [fol. 117] we gave on that particular question, as we had been giving all of the facts as we went along.

Question 50 is: "Do you offer to accept, exchange or dispose of Thrift stamps, War-savings stamps or Liberty bonds in order to sell your securities or stock?" And I answered "No."

Question 51 is: "If you answer to question 50 or any part thereof 'Yes' will you voluntarily cease and desist from such practice in the future?" And that was answered by the preceding answer.

I did not at any time, particularly at any place in my written responses to this questionnaire, refuse to give any information called for in the questionnaire, on the ground that it would tend to incriminate me, nor to any question asked me by the representative of the Federal Trade Commission, and neither did either of the trustees in my presence. The information I gave, was as far as my information went, or what I considered legitimate. I gave information to a representative of the Federal Trade Commission outside of the information in this question. Mr. Southworth wanted to know more about the plans after reading the contract with General Lee; he wanted to see the correspondence. I showed him the correspondence, both good correspondence and that I considered such, and the complaints—adjusted complaints and complaints that have not been adjusted. I did answer all questions that were demanded. There was so much information given at that time I do not recall any particular information given. It was with respect to the general workings of our business organization and everything in connection with it. There was never any order made by the Federal Trade Commission that was brought to my knowledge with respect to my business, nor did they [fol. 118] make any order against us. There was no other formal hearing at which we appeared, which was presided over by any member of the Federal Trade Commission or anybody connected with it, other than by Mr. Southworth. The same man (Southworth) appeared in our office numerous times in the same capacity, and I suppose there would be just as much dignity and importance to one visit as there would be to a number. It was the same man each time, and acting in the same capacity.

The Post Office inspector Swinson visited our office. We had a number of rooms—one suite of rooms in which all of the three companies were officed. Mr. Swinson first visited us last August. The visits of Mr. Southworth had ceased I believe, just a short time previous to Swinson's first visit. I imagine something like a week or two. I know what the official capacity of Mr. Swinson was. He talked to me about the business in question and its operations, and

requested that I give him information. He did not make any threat of any kind. I talked freely to him, as he seemed to have about as much information as I had at that time. I told Mr. Swinson on that first visit and all other occasions thereafter, substantially the same as I had told Mr. Southworth—practically the same, not quite as much detail. I do not believe the question ever came up between Swinson and myself as to whether I had been talking to Mr. Southworth"; and

Be it further remembered, that upon re-direct examination by Mr. McLean, the said Sherwin further testified:

"We had a contract, Lee, Schwarz and myself with these concerns (meaning the three companies), that we were to dig the well and furnish the money therefor, and the stockholders were to get the [fol. 119] acreage and the wells and production, and what was left over from the sale of stock, after the completion of the wells, was to be our profit. The leases and wells were to go to the stockholders. If there was anything left of the \$250,000.00 worth of stock after these wells were drilled, it was to belong to us. That was one of the contracts we turned over and explained to Mr. Southworth. The contracts between ourselves and the driller were not recorded. We furnished these documents to Mr. Southworth. The leases in most instances as recorded, showed the consideration to be One Dollar (\$1.00) and other valuable consideration, and in some instances maybe Ten Dollars (\$10.00). The real consideration for these leases I explained to Mr. Southworth.

I took Mr. Southworth out and showed him our holdings at that time, and explained just how it was. He wanted to know exactly how we expected to make any money, and I explained to him that in all further wells being drilled or to be drilled we expected to own off-set acreage, and did not expect to drill any more wild cats. This first well we were drilling was a wild cat. That was in Denton County, near Roanoke. We had 6,163 acres in leases or lands surrounding the well, and we explained to Mr. Southworth.

When Mr. Swinson come to our office he did not state where he got his information, and I stated a moment ago, that he seemed to be familiar with the transactions, and I got that from his conversation. He did not state where he got his information, but he did not get it from me; but I did give him certain additional information as he wanted and requested. I knew he was an official Post Office Inspector under the United States Government." And,

[fol. 120] Be it further remembered, that upon re-cross examination by Mr. Cahill, the witness Sherwin further testified:

"Mr. Mendenhall called at the office of our company. Mr. Swinson brought him and introduced him. I knew he was connected with the Government. He made no demand or threat. I let him examine the books. Inspector Dawkins called upon me previous to Inspector Swinson. I gave him some information about the busi-

ness operation of the company. I do not recall just what we gave Mr. Dawkins. I do not think we gave him anything the first time he called. We asked him to send us a questionnaire, which he did, and I answered it. I knew he was a Post Office Inspector. He did not make any demand or threat. All of these gentlemen (Post Office Inspectors) came after I had been convinced by Mr. Southworth that I would have to give up this information. I had not been convinced by Mr. Southworth that I would have to give up this information to anybody that came along, but I had been convinced that I would have to give it up to the Federal Trade Commission. I assumed that the Post Office Inspectors had nothing to do with the Federal Trade Commission, and in giving the Post Office Inspectors the information, I was not acting under compulsion that had been exerted upon me because of the conversation previously had with Mr. Southworth. I gave it under the advice of counsel. The information I gave to the Post Office Inspector Dawkins was—the questionnaires was answered—both Mr. Schwarz and I answered it. I was present. I can tell you some of the things they wanted to know. To the best of my recollection, it practically covered the same questions that were asked in the questionnaires of [fol. 121] the Federal Trade Commission. I told them practically the same things as I told the Federal Trade Commission, with the exception of not giving them any contracts. I do not recall whether they asked for any contracts in the questionnaire or not. I do not believe I declined to give any information they asked of me, and if my memory serves me right, if they did ask for contracts, I gave them to them. I do not believe I showed them (Post Office Inspectors) any of our private correspondence, or any of the so-called form letters. I do not think they asked for those letters and the correspondence. I did not give them or show them a list of our stockholders at that time, that is, in reference to the correspondence with Mr. Dawkin. I made other statements in the Post Office Building, and Mr. Swinson called at the office several times, and I was present sometimes and sometimes Mr. Schwarz and I were both present, and they asked for additional information, and in response to questions asked by them upon this occasion, we did give them a list of the stockholders, or tell them who the stockholders were. They asked to see some correspondence, and I believe Mr. Schwarz exhibited some to Mr. Swinson in response to a particular demand, I believe in reference to Mr. Throm, one of our stockholders. They asked for correspondence had between Throm and us, and we gave it. I am sure we showed him some of it. There was no other reason why it was not shown to him, other than the fact that it was mislaid at that time."

And be it further remembered, that the witness Charles Sherwin was examined by the Court further, and testified as follows:

[fol. 122] Question by the Court. "Now, going back to the time when your attorney was present, how much of the law relating to the powers of the Federal Trade Commission was read to you or in

your presence on that occasion, or on those occasions that you have referred to?"

Answer. "As I recall it, the entire article pertaining to the penalty for refusing to comply with the demand, and also the question as to whether or not the common law trust came under the jurisdiction of the Federal Trade Commission, was read to me."

Question by the Court. "Was this particular section read to you, which recites to you that the Commission shall have power to require by subpoena, attendance of witnesses, and produce such documentary evidence relating to any matter under investigation—was that read to you?"

Answer. "Yes, sir, I believe the Commission issues a booklet that the examiner had with him, showing that part—yes, that was read to me."

Question by the Court. "Was this also read to you, that no person shall be excused from attending and testifying or from producing documentary evidence before the Commission, or in obedience to a subpoena of the Commission, on the grounds or for the reason, that the testimony or evidence, documentary or otherwise, might tend to incriminate him, or subject him to a penalty or forfeiture—was that read to you?"

Answer. "Yes, sir."

Question by the Court. "Was this also read to you, that no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, [fol. 123] before the Commission, etc.—was that read to you?"

Answer. "No, sir, I do not recall having heard it. I did not read the booklet. I know what it contained, because it was read to me. This portion was not read to me. No, sir. Mr. Southworth did the reading of it, my attorney was no present at the time Mr. Southworth read it to me, and I did not say awhile ago that it was read in the presence of myself and attorney. When my attorney came, nothing was done other than he told me that I would have to answer these questions. That is all that took place when he was there."

Question by the Court. "Was this portion read to you—that any person who shall neglect or refuse to attend and testify to or answer any lawful inquiry, or to produce documentary evidence if it is in his power so to do, in obedience to subpoena, or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof, shall be fined, etc.—was that read to you?"

Answer. "Yes, sir."

Question by the Court. "Was this read to you—No natural person so testifying, shall be exempt from prosecution and perjury in so testifying, etc.?"

Answer. "No, sir."

And be it further remembered, that the witness Sherwin further testified upon re-direct examination by Mr. McLean:

"I had the advice of counsel with respect to answering questions of the Post Office Inspector. I advised with several attorneys. I believe it was in November, but after I had given information to Mr. Dawkins. I answered one questionnaire to Mr. Dawkins. My attorneys advised me to give these Inspectors everything they wanted, [fol. 124] and did not suggest whether it would be a matter of policy or duty. I came to the conclusion that it was a matter of duty to give it to them.

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And be it further remembered, that H. H. SCHWARZ, one of the defendants, was called as a witness on behalf of the defendants, and the following proceedings were had:

The Court: "I suppose the testimony given by this witness will be substantially the same thing (meaning the same as the testimony of the defendant Sherwin)."

Mr. McLean: "Yes, sir, and let the record show that."

The Court: "All right, do you want to cross examine him? Either side may ask him any further questions if they desire in addition."

Mr. Cahill: "I would like to ask him some questions."

The Court: "Have you any questions, Mr. McLean?"

Mr. McLean: "No, your Honor."

The Court: "Go on, Mr. Cahill."

[fol. 125] Question. "Did you request permission to appear before the Federal Grand Jury, and not return the indictment against you?"

Answer. "I did. I signed the paper dated March 31, 1923, which you now show me. I appeared before the Federal Grand Jury and did give testimony with respect to these three companies. The statement I signed was to the effect that I voluntarily requested the United States Grand Jury sitting at Fort Worth, Texas, to permit me to appear before them in the matter now under consideration, concerning Robert A. Lee, Charles Sherwin, H. H. Schwarz and associates, and concerning the General Lee Oil Interests, and requested the foreman to administer the oath of a witness to me, and acknowledged that I had been duly sworn by H. L. Arterberry, Special Assistant United States Attorney, that I did not have to make a statement at all, and that any statement I did make must be free and voluntary, and that the same could be used against me in any proceedings in which I might become a party in any Court of the United States, and cannot be used for me, which was signed by me and delivered to Mr. Arterberry."

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Be it further remembered, that J. S. SWINSON being duly sworn on behalf of the Government and examined, testified as follows:

"I am Post Office Inspector, and I had charge of the investigation of the three General Lee Companies. I directed other Inspec-

tors who were engaged in that investigation. Prior to my reading the motion I did not know that there had been any investigation of those three companies or the defendants in this General Lee Indict- [fol. 126] ment by the Federal Trade Commission. I learned this three days ago, when I read the motion in the United States Attorney's office. I did not get any information from the Federal Trade Commission or any of its representatives with respect to the defendants or their companies, and no complaints came from the Trade Commission against these defendants—they came from individuals. I got some letters, circulars and prospectuses from the companies—a great many. I did not get anything like a full list of the stockholders. I did get a few names and addresses. I got a statement from the defendant Sherwin. He said he had consulted an attorney before signing it. He took it away with him and brought it back signed.

I know John F. Southworth. I met him last Fall. I did not talk to him about the General Lee matters. As near as I can get at it, his business is to procure information for the Federal Trades Commission of the United States Government. I think his title is, Special Examiner, Federal Trades Commission. Sherwin and Schwarz both gave me information. I got information and a statement from each one, that is, Sherwin and Schwarz and General Lee showing and concerning operation of these three concerns; that they were promoting it; the amount of money collected and how the operations were being conducted. We discussed two or three names of stockholders that we had complaints from. I called their attention to these complaints and told them the parties had been complaining and their names. I asked for correspondence between them and complainants, particularly a telegram sent to an agent who had sold stock to Throm. Schwarz reported that he could not find it. I afterwards asked them that I might be permitted to see the whole Throm file, but that was declined. I think that was the first of [fol. 127] this year. This was the first declination I got from either of them. I believe it was evidence I specifically asked for. The reason they said they wanted to see their attorney before signing the questionnaire, and what gave rise to that, was, we had talked about the operations generally; how much money that they had collected; what they had done; how many stockholders they had, and complaints received. We took notes, and the statement was dictated to a stenographer by myself in their presence, and that was read—each one took the statement and said he would like to consult his attorney before signing it. Each one carried the statement away, and later returned with it signed by each one. That was the only time the matter was mentioned or came up between us, and they simply said it was best not to sign any statement at all until after consulting an attorney. That it was true that they had no objection to signing it, but it was best to see their attorney. When I first approached these defendants I told them who I was, and what my business was, and that they were not obliged to answer any questions unless they wished to; that we would like to have the facts and find out about the business, and see if the complaints made were justified,

and each one said they would be perfectly willing to give any information and answer any questions, and I told them further that the information that they might give might be used against them, that there was a chance for that, although I did not know what might be done.

I never heard of the Federal Trade Commission's investigation from them or anyone, until I read this concern. The first time I ever heard anything about the Federal Trade Commission investigating them, and we never got any information, documents or letters of [fol. 128] any kind or description, and I never had any conversation with Mr. Southworth or any other agent of the Federal Trade Commission regarding these people that I recollect. Mr. Southworth was investigating another case. I saw him two or three times. I had charge of the investigation of this particular case, and assisted in presenting it to the Grand Jury. I had and presented to the Grand Jury, evidence obtained from these defendants in the manner and at the time heretofore indicated, including the statement signed by them. I think I read part of the statements to the Grand Jury."

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And be it further remembered, that H. L. ARTERBERRY, being duly sworn on behalf of the Government and examined, testified as follows:

"I am Special Assistant United States Attorney, and as such presented the case to the Grand Jury that resulted in the indictment now under consideration. At that time I did not know anything about the investigation of the defendants or their companies by the Federal Trade Commission. I never heard that until the filing of their motion in the case. Nothing developed in the Grand Jury proceedings that would show or indicate such, and I never heard of it. Mr. Schwarz was the only defendant who appeared."

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And be it further remembered that upon the trial of the above entitled cause, it was agreed by and between the United States as plaintiff and the defendants, Charles Sherwin and H. H. Schwarz as defendants, by and through their respective counsel of record, with the approval of the Court, as follows:

[fol. 129] That the testimony of the defendant Harry H. Schwarz of and concerning the plea of immunity, was and is substantially the same as that of the defendant, Charles Sherwin.

That the Government's exhibits one, two and three, the same being the declarations of trust of the General Lee Interests No. One, General Lee Interests No. Two, and the General Lee Development Interests respectively (which are copied herein) were introduced by the Government in the trial of this case on its merits; that identical copies of each of these documents, are the same ones which the defendants Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission, and that each

of these documents were recorded in the deed records of Tarrant County at the time the copies thereof were furnished. That the Government exhibit No. —, the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson as second parties, of date April 12th, 1922, and the same containing a copy of the agreement by and between R. A. Lee, and Sherwin and Schwarz, concerning the compensation of the said Robert A. Lee for his services in said company (a copy of which contract is contained herein), is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and that this last mentioned exhibit was introduced by the Government in the trial of this case on its merits.

Thereupon, both sides closed.

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#### DEFENDANTS' REQUESTED INSTRUCTIONS TO JURY

And be it remembered, that at the conclusion of the testimony, and before the argument of counsel, the defendants Charles Sherwin [fol. 130] and Harry H. Schwarz, by their attorneys, presented to the Court their motion to peremptorily instruct the jury to return a verdict of "Not Guilty" in this case under each count in the indictment, and requested the Court to instruct said Jury as follows:

"Now comes the defendants Charles Sherwin and H. H. Schwarz, and requests the Court to instruct the jury herein as follows:

GENTLEMEN OF THE JURY: You are instructed to return a verdict of not guilty against the defendants Charles Sherwin and H. H. Schwarz upon their plea of immunity, and the form of your verdict shall be:

We, the jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty.

— — —, Foreman."

which requested instruction was then and there in all things overruled, and to which action and ruling of the Court in refusing said instruction, the defendants Charles Sherwin and H. H. Schwarz through their attorneys, in open Court, excepted and still except, which said exception is now entered of record; and

Be it further remembered, that at the conclusion of all the testimony the defendants Charles Sherwin and H. H. Schwarz requested the Court as follows:

"Comes now the defendants Charles Sherwin and H. H. Schwarz, [fol. 131] and requests the Court to submit to the jury in appropriate language and in terms of law, the issue of immunity as raised by their plea in bar herein filed, and permit said jury to pass on same

separately and apart from the issue of 'guilty' or 'not guilty' as raised by the averments in the indictment and their plea of not guilty thereto."

which request and motion was by the Court then and there in all things overruled, to which action and ruling of the Court, the defendants Charles Sherwin and H. H. Schwarz each by their attorneys in open Court excepted, and still excepts, which said exception is now entered of record; and

Be it further remembered, that at the conclusion of the testimony, and before the Court had charged the jury with respect to the law applicable to the case the defendants Charles Sherwin and H. H. Schwarz presented to the Court their requested instructions to the jury, and requested the Court to instruct the jury as follows, with respect to the plea of immunity:

"GENTLEMEN OF THE JURY: You are instructed that under the law, the Federal Trade Commission or any of its duly authorized agent or agents, has the authority to demand of any corporation or common law trust by making demand on those natural persons in charge thereof, to answer any lawful inquiry so made by said Commission or its said agent or agents, and to attend and testify, and to answer any lawful inquiry, and to produce documentary evidence if in his power so to do in obedience either to the subpoena or lawful requirement of said Federal Trade Commission, and which authority [fol. 132] such Federal Trade Commission and its duly authorized agent or agents possess under the law, even to the extent of requiring such natural persons to give such evidence or furnish such documentary evidence or other information that incriminates such natural person, and shows him, or tends to show that he has been guilty of an offense against the laws of the United States. But in this connection, you are further instructed that such law would not be constitutional unless it further provides, as it does, that no such natural person, after having complied with such lawful demand of the Federal Trade Commission, and given testimony and evidence, or furnished documentary evidence or otherwise, or made answers to any lawful inquiries in obedience to such lawful requirement, shall not be prosecuted or subject to any penalty or forfeiture on account of any transaction, matter or thing concerning which he so testified or produced evidence, documentary or otherwise, in answer to such lawful demand as aforesaid.

Now, then, bearing in mind the instructions hereinabove, if you find and believe from the evidence that the defendants Sherwin and Schwarz, in answer or compliance either of the subpoena or lawful demand of the Federal Trade Commission, or one John F. Southworth as the duly authorized agent of said Federal Trade Commission, if you so find, and answered a certain questionnaire demanded by the said Federal Trade Commission for this said defendant to answer, and to furnish to said Southworth the books, records, letters, letter-files, advertising matter, exhibit the physical assets of said company to said Southworth, and generally informed said Southworth of the nature and scope of the business said companies were engaged

in, and the kind and character thereof, and copies of the letters it was sending through the United States Mails if any such were being [fol. 133] sent, and generally, if you find and believe from the evidence that the defendants Charles Sherwin and Harry H. Schwarz furnished information, documentary or otherwise, to said Southworth or to said Federal Trade Commission about any matter, thing or transaction charged against defendant in the indictment herein, or about any matter, thing or transaction introduced in evidence against them in the trial of this case under the indictment herein; or, if you find and believe from the evidence that this defendant furnished to said Federal Trades Commission, in compliance with its lawful demand, any evidence, documentary or otherwise, about any matter, thing or transaction tending to incriminate this defendant, or criminating him of the offense charged against him in the indictment herein, then in either event, you are instructed that in such case the law has provided immunity for this defendant and he cannot be convicted of the offense charged against him in the indictment herein, and you will find the defendant 'not guilty' on the ground that he is immune from prosecution and conviction, and the form of your verdict shall be:

We, the Jury, find the defendant 'not guilty' on the ground that he is entitled to immunity under the law."

which charge and instruction the Court then and there refused to submit to the jury, and overruled and refused same, to which action and ruling of the Court in refusing so to instruct said jury, the defendants Charles Sherwin and H. H. Schwarz, by their attorneys, in open Court excepted, and still except, which said exception is now entered of record; and

Be it further remembered, that upon the conclusion of the argument [fol. 134] of counsel, the Court proceeded to charge the jury, and after having charged them with respect to the law applicable to the charge as set forth in the indictment, and supported by the evidence on its merits, which portion of the charge was not excepted to, the Court charged the jury with respect to the plea of immunity of these defendants as follows:

#### COURT'S INSTRUCTIONS TO JURY

"The COURT: Now, there has also been introduced in this case, gentlemen, a special plea of the defendants Sherwin and Schwarz claiming immunity from prosecution because of certain transactions had before the Federal Trade Commission, the nature of which are set forth in detail in the evidence stipulated in the case, and which need not be detailed at this moment. With respect to that plea as indicated by the Court the other day in the judgment of the Court, there being no question of facts involved, and counsel being of the opinion that there is no question of facts involved, there is no conflicting evidence, it being purely a question of law presented the Court therefore will instruct you, and does instruct you to return

a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use, a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the Court, and I will ask your foreman before returning into Court, to sign that verdict."

#### ARGUMENT OF COUNSEL

And be it further remembered, that upon the conclusion of the delivery of the charge of the Court to the jury, and before the jury retired from the jury box to consider their verdict, the defendants Charles Sherwin and H. H. Schwarz by their attorneys, excepted to [fol. 135] that portion of the charge as follows:

"The Court therefore will instruct you, and does instruct you to return a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the Court, and I will ask your foreman before returning into Court, to sign that verdict."

and the defendants still except to same, and said exception is now entered of record.

And be it further remembered, that after the charge of the Court was submitted to the jury, the jury retired to consider their verdict, and thereafter, on the 5th day of June, A. D. 1923, returned into open Court their verdict concerning the plea of immunity as follows:

#### VERDICT AND JUDGMENT

"With respect to the plea of immunity interposed by the defendants Charles Sherwin and H. H. Schwarz herein, pursuant to the direction of the Court, we, the jury, find for the Government and against the defendants."

also returning their verdict upon the merits of the case, finding defendants Sherwin and Schwarz guilty as charged in counts one, two, three, four, five and six; and thereafter the Court entered judgment on said verdict, and sentenced the defendants Charles Sherwin and H. H. Schwarz each for a term of confinement in the penitentiary at Leavenworth, Kansas, for a term of five (5) years on [fol. 136] the first count of the indictment; five (5) years on the second count of the indictment; five (5) years on the third count of the indictment; five (5) years on the fourth count of the indictment; five years on the fifth count of the indictment, and two (2) years on the sixth count; the first and second counts to run con-

secutive, and the third, fourth, fifth and sixth counts to run concurrent with the first and second counts; and in addition thereto, fined each of said defendants \$1,000.00 on the first count; \$1,000.00 on the second count; One Thousand (\$1,000.00) Dollars on the third count; One Thousand (\$1,000.00) on the fourth count; One Thousand (\$1,000.00) on the fifth count, and Ten Thousand (\$10,000.00) Dollars on the sixth count.

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IN UNITED STATES DISTRICT COURT  
ORDER SETTLING BILL OF EXCEPTIONS

And this is to certify that the defendants Charles Sherwin and H. H. Schawarz, on the — day of July, A. D. 1923, presented the foregoing bill of exceptions for approval and allowance, and I here now settle and have settled the above and foregoing as the bill of exceptions in this cause; and

It is now adjudged, ordered and decreed to be the bill of exceptions herein, and as such the same is here so settled, allowed and approved, and made a part of the record in this cause, and the Clerk of the Court is directed to file the same in the record of this cause, as the Bill of Exceptions herein.

Bledsoe, Judge.

[File endorsement omitted.]

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[fol. 137] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 11, 1923

Charles Sherwin and Harry H. Schwarz, defendants in the above entitled and numbered cause, in connection with their petition for writ of error, make and file this their assignment of errors, and show:

1

That the Court erred in overruling their demurrers and exceptions to the indictments against them and their motion to quash same, for the reasons therein assigned, which motion is made a part of this assignment as fully and as complete as though copied herein.

2

The Court erred in overruling and in not sustaining their plea of immunity in the nature of a plea in abatement, for each and

every reason therein assigned, which said plea is made a part of this assignment as fully and as complete as though copied herein.

## 3

That the Court erred in peremptorily instructing the jury to return a verdict against the defendants on the issue of their plea in immunity, and in using the following language with respect thereto:

[fol. 138] "GENTLEMEN OF THE JURY: You are directed to return a verdict against the defendants Charles Sherwin and Harry H. Schwarz on their plea of immunity."

And the Court thereupon caused to be prepared and executed by said jury the verdict against these defendants with respect to said immunity plea, which said verdict of the jury is made a part hereof as fully and complete as if copied herein.

## 4

The Court erred in refusing to direct the jury to return a verdict of not guilty against each of these defendants on their plea of immunity as was requested by defendants in writing, which requested instruction is as follows:

## Requested Instruction No. —

"You are instructed to return a verdict of 'Not Guilty' against the defendants Charles Sherwin and Harry H. Schwarz upon their plea of immunity, and the form of your verdict shall be:

We, the Jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty."

## 5

The Court erred in refusing to instruct the jury in appropriate language and in terms of law as to the rights of defendants with respect to the issue of immunity as raised by their plea in immunity [fol. 139] and the evidence concerning same, as was set forth in defendants' requested charges numbers — and — as follows:

## Requested Charge No. —

"Come now the defendants Charles Sherwin and H. H. Schwarz, and request the Court to submit to the Jury in appropriate language, and in terms of law, the issue of immunity as raised by their Plea in Bar herein filed, and permit said Jury to pass on same separately and apart from the issue of "Guilty" or "Not Guilty" as raised by the averments in the indictment and their plea of "Not Guilty" thereto."

## Requested Charge No. —

"You are instructed that under the law, the Federal Trades Commission or any of its duly authorized agent or agents, has the authority to demand of any corporation or common law trust by making demand upon those natural persons in charge thereof, to answer any lawful inquiry so made by said Commission or its said agent or agents, and to attend and testify, and to answer any lawful inquiry, and to produce documentary evidence if in his power to do so in obedience either to the subpoena or lawful requirement of said Federal Trades Commission, and this authority such Federal Trades Commission and its duly authorized agent or agents possess under the law, even to the extent of requiring such natural persons to give such evidence or furnish such documentary evidence or other information that incriminates such natural person, and shows him, or tends to show that he has been guilty of an offense against the laws [fol. 140] of the United States. But in this connection, you are further instructed that such law would not be constitutional unless it further provided, as it does, that no such natural person, after having complied with such lawful demand of the Federal Trades Commission, and given testimony or evidence, or furnished documentary evidence or otherwise, or made answers to any lawful inquiries in obedience to such lawful requirement, shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he so testified or produced evidence, documentary or otherwise, in answer to such lawful demand as aforesaid.

Now, then, bearing in mind the instructions hereinabove, if you find and believe from the evidence that the defendants Charles Sherwin and H. H. Schwarz, in answer or compliance either of the subpoena or lawful demand of the Federal Trades Commission, or of one John F. Southworth, as the duly authorized agent of the said Commission, if you so find, and answered a certain questionnaire demanded by the said Federal Trades Commission for this said defendant to answer and furnish to said Southworth the books, records, letters, letter-files, advertising matter, exhibit the physical assets of said companies to said Southworth, and generally informed said Southworth of the nature and scope of the business said companies were engaged in, and the kind and character thereof, and copies of the letters it was sending through the United States Mails if any such were being sent, and generally, if you find and believe from the evidence that the defendants Charles Sherwin and H. H. Schwarz furnished information, documentary or otherwise, to said Southworth or to said Federal Trades Commission about any matter, thing [fol. 141] or transaction charged against said defendant in the indictment herein, or about any matter, thing or transaction introduced in evidence against them in the trial of this case under the indictment herein; or, if you find and believe from the evidence that this defendant furnished to said Federal Trades Commission, in compliance with its lawful demand, any evidence, documentary or otherwise, about any matter, thing or transaction tending to in-

criminate this defendant, or criminating him of the offense charged against him in the indictment herein, then, in either event, you are instructed that in such case the law has provided immunity for this defendant and he cannot be convicted of the offense charged against him in the indictment herein, and you will find the defendant not guilty on the ground that he is immune from prosecution and conviction, and the form of your verdict will be:

We, the Jury, find the defendant not guilty on the ground that he is entitled to immunity under the law."

Requested Charge No. —

"The defendants Charles Sherwin and H. H. Schwarz have filed herein their plea of immunity, which has been read to you by the Court, which in effect is an application on the part of said defendants to have the Jury determine whether or not their acts in giving testimony, information and documents of and pertaining to the business and operation of the General Lee Interests, One (1) and Two (2), and the General Lee Development Interests to one John F. Southworth, agent of the Federal Trades Commission, as has detailed in the evidence before you, constitutes, under Article 8836-A to N inclusive, immunity to them, and operates to prevent their conviction [fol. 142] herein, and in this connection I charge you as follows:

If John F. Southworth, who, it is admitted, was the duly constituted agent of the Federal Trades Commission, demanded, required and received of and from the defendants Charles Sherwin and H. H. Schwarz, testimony, evidence and documents of, belonging to, and connected with the operation of the business of the three (3) Companies herein mentioned, and required them to answer questions with respect thereto, over the protests and without the consent of the said Charles Sherwin and H. H. Schwarz, and that the said defendants Sherwin and Schwarz refused to give said information, testimony and documents until the said Southworth had demanded same under and by virtue of the terms of Article 8836, et seq., then you will acquit the defendants upon their plea of immunity, and say by your verdict "Not Guilty."

Wherefore, each of said errors being highly prejudicial to the rights of these defendants and each of them, they pray that the judgment of the District Court may be reversed.

McLean, Scott & Sayers, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 143]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed July 11, 1923

Charles Sherwin and Harry H. Schwarz, defendants in the above entitled and numbered cause, feel themselves aggrieved by the verdict of the Jury returned herein on the 5th day of June, A. D. 1923, and the judgment rendered thereon on — day of June, A. D. 1923, and in the records and proceedings had in said cause, come by McLean, Scott & Sayers, their attorneys, and petition the Court for an order allowing the defendants to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Fifth Judicial Circuit, under and according to the laws of the United States in that behalf provided, and also that an order be made fixing the amount of security which each of these defendants shall give under said writ of error, and that upon giving the same that all further proceedings in this Court be suspended and stayed until the determination of such writ of error, for which your petitioners will ever pray.

McLean, Scott &amp; Sayers, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 144]

[Title omitted]

On this the 9 day of June, A. D. 1923, came the Defendants Charles Sherwin and Harry H. Schwarz, by their attorneys, and file herein and present to the Court their petition, praying for the allowance for a writ of error intended to be urged by them, and praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Court of Appeals for the Fifth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendants each giving a bond according to law in the sum of Thirty Thousand (\$30,000.00) Dollars, which shall operate as a supersedeas bond, and stay all proceedings until final determination of the writ of error.

Bledsoe, United States District Judge.

[File endorsement omitted.]

[fol. 145 & 146] SUPERSEDEAS BOND ON WRIT OF ERROR FOR \$30,000  
—Approved and filed July 11, 1923; omitted in printing

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[fol. 147 & 148] SUPERSEDEAS BOND ON WRIT OF ERROR FOR \$30,000  
—Approved and filed July 23, 1923; omitted in printing

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[fol. 149] COST BOND ON WRIT OF ERROR FOR \$500—Approved and  
filed July 11, 1923; omitted in printing

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[fol. 150] IN UNITED STATES DISTRICT COURT

STATEMENT RE WRIT OF ERROR AND CITATION

Writ of Error and Citation omitted from the printed record, the  
originals thereof being on file in the office of the Clerk of the U. S.  
Circuit Court of Appeals for the Fifth Circuit.

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IN UNITED STATES DISTRICT COURT

PRÆCIPUE FOR TRANSCRIPT OF RECORD

[Title omitted]

Louis C. Maynard, Clerk.

SIR: Please prepare a transcript of the record in the above en-  
titled and numbered cause, and include therein the following papers:

[fol. 151] 1. Designation and assignment of Honorable Benjamin  
F. Bledsoe.

2. Indictment.

3. Defendants' plea of immunity.

4. Government's replication to plea of immunity.

5. Judgment and sentence.

6. Bill of exceptions.

7. Assignments of error.

8. Petition for writ of error.

9. Order allowing writ of error; and fixing bail.
10. Writ of error bond.
11. Writ of error.
12. Citation in error.

Respectfully, McLean, Scott & Sayers, Attorneys for Defendants Sherwin and Schwarz.

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[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed May 28, 1923

Defendants above named are charged with the devising of a scheme or article to defraud and the subsequent use of the mails in consummation thereof, in violation of Section 215 of the Federal Penal Code, (Sec. 10385, U. S. Comp. Stats.) and also, in a separate count, with entering into a conspiracy to violate said section 215. Briefly, the scheme was that the defendants would and did organize certain companies in the guise and under the name of "Common Law Trusts," one of which was called the "General Lee Interests No. 1," another the "General Lee Interests No. 2," and the third, "General Lee Development Interests." All these were for the pretended purpose of engaging in the production and sale of oil and gas leases and the engaging in the oil business in general for profit; that they would issue large amounts of stock or certificates of beneficial interests in said company and sell the same to all persons whom [fol. 153] they could induce to buy the same by means of false, and fraudulent representations, pretenses and promises concerning said companies and their business; and also, that they would make representations as to the standing, character and qualifications of defendant Robert A. Lee, claiming that he was related to Robert E. Lee.

Specifically, it was represented that the companies were under the personal and complete management and direction of Robert A. Lee, a descendant of the great Confederate General, Robert E. Lee; that Robert A. Lee was a great engineer of proven ability and long and successful experience who had located scores of successful oil wells; further, that he had located the mother lode of the Mexia field; that he had just located and was preparing to drill in the apex of the most promising oil field in Texas and that through maturing of plans laid out by him, one of the most ambitious enterprises the oil world had ever known would be consummated; that it was only through his personal influence that the vast acreage at his command had been obtained and that he was offering his friends the opportunity to share his good fortune with him; that as General Robert

E. Lee gave his life to the cause of the South, so General Robert A. Lee was giving his life to the oil industry and the great cause of humanity.

The falsity of these various representations and promises was averred with identic detail and it was charged that Robert A. Lee was in no wise related to General Robert E. Lee nor even to the historic Lee family; that he was neither geologist, engineer nor oil man; that he had made no discovery of oil in the mother lode nor otherwise and was nothing but a common laborer theretofore employed in the state capitol of Idaho; that in fact he had loaned his [fol. 154] name to the scheme devised and the General Robert A. Lee Company controlled by the defendants Sherwin and Schwarz for the agreed sum of \$12.50 per week.

The defendants Charles Sherwin and Harry H. Schwarz above mentioned, filed a special plea by way of immunity from prosecution alleging that they were connected as officials with the common law trusts referred to hereinabove and that prior to the convening of the grand jury returning the indictment herein, one J. F. Southworth, a Special Examiner of the Federal Trade Commission came to the offices of the defendants and demanded documentary evidence concerning said companies and of the participation by these defendants in the promotion of said companies and demanded that the defendants and each of them answer his lawful inquiries with respect to said companies and the promotion thereof. That the demand was made by Southworth under the pains and penalties of violating the law subjecting themselves to imprisonment and fine, in case of a refusal; that thereupon, in obedience to said demand of the said Federal Trade Commission, acting by and through its authorized agent, "these defendants produced, exhibited and delivered to said officer said documentary evidence showing how and in what manner said oil companies were organized, and showing the connection of these defendants therewith and of the other persons therewith, and of the character and kind of business then being done, and the nature of said business, and in fact all of the documents and records of said oil companies then in possession of these defendants;" and in addition thereto, "did orally testify before said officer, and answer all of the questions then and there by him propounded, and fully complied in every way with the demands of said Federal Trade Commission acting by and through said officer under the pains and penalties of the law."

[fol. 155] It was then asserted in said plea, that thereafter the grand jury for this district convened and the evidence given by these defendants to the Federal Trade Commission was delivered over and produced before said grand jury and upon said evidence, or at least a major part thereof, the grand jury found the bill of indictment. It was also asserted that because of the facts above set out, under authority of Arts. 8836-I and 8836-J of the U. S. Compiled Statutes, the defendants stand entitled to complete immunity herein. A demurrer to the immunity plea having been overruled, the government filed a replication.

Both parties consenting, the issues of fact raised by the plea of im-

munity and replication thereto, were tried before the Court without a jury. Upon the hearing it developed that a form letter was sent from Washington by the Secretary of the Federal Trade Commission to the General Lee Development Interests requesting information in accordance with a schedule or questionnaire appended thereto. No attention was paid to this and some time thereafter, the Special Examiner, Southworth, appeared at the office of the companies in Fort Worth and asked for the information theretofore requested. Defendants demurred, apparently in the belief that the law creating the Federal Trade Commission and defining its jurisdiction, had no application to common law trusts. A conference was had with their attorney and as a result he was impressed with the belief that such concern as had been organized by the defendants was subject to the jurisdiction of the commission. In that connection, it is asserted that certain portions of the law contained in Section 8836-I, supra, relating to the enforced production of evidence whether it might tend to incriminate the parties or not, was read to the defendants. That portion of the same paragraph granting them immunity [fol. 156] was not read to them nor mentioned in their presence. Accepting the advice of their counsel that the common law trusts organized by them were subject to the jurisdiction of the Commission, they answered in considerable detail the numerous questions contained in the questionnaire and also exhibited certain letters to and from their stock or unit holders and certain correspondence having to do with adjusted and unadjusted complaints arising out of the sale of stock or units. No subpoena was issued, neither of the defendants were sworn and none of the statements made by them were under the sanctity of an oath.

A Postoffice Inspector in this district testified that he and he alone was responsible for the presentation to the grand jury of the matters leading up to the indictment; that none of the evidence presented to the grand jury had been obtained from or secured by the Federal Trade Commission, and that he was unaware at the time of such presentation which arose because of complaints coming to him as Postoffice Inspector, that the matter had previously been the subject of consideration by the commission at all.

BLEDSON, District Judge, after reciting the facts above:

The statute creating the Federal Trade Commission, 38 U. S. Stats. 717, et seq., Sec. 8836-a-8836-r, U. S. Comp. Stats., was intended to provide an instrumentality of the government by which in a general way the injustice arising from unfair competition in business might be prevented and certain standards of business morality raised. The Commission was authorized to take cognizance of complaints in- [fol. 157] volving asserted unfair competition and in addition authorized to gather and compile information with respect to the organization, business conduct, practices and management of corporations, looking to the matters of the sort and kind of trade and commerce conducted by such corporations. Among other things, the Act provided (8836-i, U. S. Comp. Stats.) that for the purposes of the

Act, the Commission or its duly authorized agent or agents, shall at all reasonable times have access to the business of any corporation for the purpose of examining it and the right to copy any documentary evidence of any corporation being investigated or being proceeded against. The commission is given power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas and members and examiners of the Commission may administer oaths and affirmations, examine witnesses and receive evidence. Provisions for the attendance of witnesses at such places as may be desired or necessary is made. It is specifically provided that "no person shall be excused from attending and testifying or from producing documentary evidence before the Commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

[fol. 158] From the testimony adduced at the hearing hereat, it is apparent that, pursuant to request or demand made by the Commission or one of its Special Examiners, the defendants gave answer to certain questions contained in a lengthy questionnaire and permitted inspection or furnished copies of certain documentary evidence in their possession. With respect to the latter, it may be said that it all pertained and perhaps belonged to the common law trust which they had organized and of which they severally were trustees. Whether as such, under the holding in *Wilson v. U. S.* 221 U. S. 361, they possessed no privilege respecting a disclosure of the same, need not now be determined. It is now asserted by them that the evidence given by them pursuant to the above mentioned demand or request concerned and touched upon the matters embraced in the charge pending herein; that, in consequence, pursuant to the terms of the immunity provisions quoted, they are immune from prosecution and should be dismissed herefrom. It is the fact that no subpoena was issued and that neither of the defendants were sworn concerning the matters with respect to which they furnished the Commission with information. It is also the fact that the questionnaire, containing some fifty or more questions, touched upon the organization and business methods, conduct, nature and sources of the business of these common law trusts or companies that had been organized by the defendants and the engagement in which, and furtherance of which it is charged, constituted a part of the scheme or device to defraud lying at the base of the present prosecution. There is undisputed testimony that the defendants at first declined to or just perhaps neglected, to make answer to the questions contained in the questionnaire when the same was first forwarded to them by the commission. However, they were pressed for a

[fol. 159] compliance by the Special Examiner of the Commission, he making a number of personal calls to their place of business. Finally, having certain provisions of the Federal Trade Commission statute read to them, and being advised by counsel that it was their duty, under the law, as a common law trust, to submit to the jurisdiction of the Commission and give the information desired, they acceded to the request. It was specially developed in the evidence that at no time was the law respecting immunity, as set forth hereinabove, read to them and it is not only the fair but necessary inference, in my judgment, from all the testimony, that at no time did they give information or furnished documentary evidence to the examiner because of any reliance or belief by them that as a consequence of the giving of such information or evidence they would be the recipients of, or be entitled to, immunity with respect to any matter concerning which they were examined. It is the fact that no claim or suggestion was made by either of them at any time that any information sought or questions asked or any answers required to be given, would in any wise serve or tend to incriminate them or either of them. It is also the undisputed evidence that the postal inspector, responsible for the initiating of the present prosecution, who secured the evidence and caused it to be presented to the grand jury, obtained none of his information from the Federal Trade Commissioner or any agent thereof. Presumably all the information secured by the Commission was transmitted to its office in Washington in due course and is now on file and undisturbed among the archives.

These being the facts, the question presented is, does the transaction in its entirety, as I have sketched it, suffice, under the provisions of the Federal Trade Commission Act, to operate as a general amnesty of these defendants concerning all the matters having to do with their operation, management and conduct of the business of these three common law trusts?

It has been decided by the Supreme Court of the United States in *Brown v. Walker*, 161 U. S. 591, 606, that a statute essentially similar, respecting the giving of testimony before the Interstate Commerce Commission and the resultant immunity provided for therein, operates to secure a general immunity applicable whenever and in whatever Court a prosecution may be attempted. In other words, the law of the United States being the supreme law of the land, any law of the United States operating as a grant of general immunity, operates throughout the United States in both Federal and State Courts. So, then, we have this situation. Because of some complaint filed with the Federal Trade Commission, or some criticism indulged in, or perhaps because of some general investigation being conducted by the Commission, an investigation of the conduct of the business of these particular concerns was instituted. In response to a somewhat insistent request for information and in obedience thereto, such information was furnished. At no time during the conduct of the investigation was any suggestion made or tendered that incriminating matter was being called for or given. Similarly, at no time during the proceedings was any suggestion made, tendered or even enter-

tained that immunity from criminal prosecution was to accrue as a result of the disclosures being indulged in. Under the conditions obtaining, to hold with the defendants is to hold that, with no preliminary assertion or privilege, suggestion of incrimination or previous notice of any sort to the government at all, they are forever immunized from prosecution in any Court of the United States or [fol. 161] of any state of the United States with respect to any act committed or transaction had by them concerning which information was given to the Federal Trade Commission. That is the situation in its nakedness. In its nakedness it is so abhorrent to my sense of justice that I believe it merits unqualified condemnation.

Justice is our aim and justice is based upon reason and fairness. In criminal justice, there must be fairness to the Government as well as fairness to the individual. In order that no man might be convicted of crime out of his own mouth, by Constitutional enactment, the absolute privilege was guaranteed to him of declining to testify at all with respect to any matter which might tend to incriminate him and therefore subject him to possible prosecution or punishment. It was long since made manifest, however, that it might be better in certain matters of public moment for the public to waive all right to impose criminal punishment on the individual and in consideration of such express waiver, compulsorily to demand and secure from him any and all evidence deemed relevant and material in respect to designated matters more or less vitally affecting the common good. Because of the obvious fairness of the situation thus presented, the people have provided, by law binding upon all the Courts of the United States and the various states, that if the government, through any of its specified instrumentalities does exact information from a man, does compulsorily require him to testify respecting matters that might incriminate him, he shall thereafter be free in every Court of the country from prosecution or the possible exaction of a penalty or forfeiture. But, in order that the statute may have a reasonable construction, in order that there may be a rational operation of the obligations resting no less upon the individual than upon the government; in order that society itself may receive some fair measure of protection; in order that the criminal law may not be rendered impossible of enforcement and in order that opportunities and avenues of escape may not be opened so that sundry clever criminals in our midst may be permitted to go hence unwhipped of justice, I am persuaded that at some time during the course of the proceeding resulting in the compulsory furnishing of information and in virtue of which a valid claim of immunity is thereafter to be urged, the question of possible incrimination should be broached, and upon the notice thus given, organized government, representing the people, should be accorded the right of election as to whether the nature of the matter under investigation justifies the compulsory exacting of the testimony asserted to be incriminating and the consequent immunizing of the witness.

Now, in dealing with this claimed immunity, though the argument took rather a wide range, it is not necessary to determine whether a subpoena should have issued or whether the men ought

actually to have been sworn or whether they should actually have claimed their constitutional privilege and positively or even tentatively refused to answer because of their belief that their answers might serve to incriminate them. In a proper case, one or more of these circumstances might justify careful consideration. Here, however, as already indicated, there was no suggestion at any time by anybody of a possible claim of, or a reliance upon, expected immunity. Neither of the defendants entertained any idea, in my judgment, that they were to be the beneficiaries of any immunity in virtue of their giving information relative to the business they were conducting, and of course nobody representing the government had [fol. 163] any suspicion that such would be claimed or a possible consequence. From their own attitude and admissions, it is apparent they knew nothing about any possible immunity until they had employed astute counsel in the case now pending. I am persuaded, therefore, that it is a reasonable construction of the statute to hold that one who would seek to take advantage of it, must make it appear, or at least take such steps as to put the government upon notice, at such time as will enable the government to elect as to the course it desires to pursue, that there are matters with respect to which he is being or about to be interrogated, which may tend to incriminate him and that, in consequence, if he testifies or yields information, it must be in consideration of immunity being accorded to him, pursuant to the terms of the law. Any other construction of the statute will make it possible for an individual who has been guilty of perhaps a heinous crime concerning, or in connection with, some business transaction that may touch upon commerce, to have initiated some sort of an investigation by the Federal Trade Commission and then, upon an inquiry being made, to give some information touching the matter concerning the crime and thereafter as a legal consequence, be exempt from prosecution in any Court of the land. (See *U. S. v. Bryant*, 245 Fed. 682). If such should be rendered possible, practical and positive law enforcement would be reduced to a very low ebb in this country.

In the absence of any showing or suggestion of the sort indicated and consequent election or opportunity of election on the part of the government, it must be held that the information furnished by the defendants to the Federal Trade Commission, was essentially voluntary in character and that no immunity results as a legal or other consequence.

Defendants have cited *U. S. v. Armour & Co.*, 142 Fed. 808, 824-825 and *U. S. v. Bell*, 81 Fed. 837. The inappositeness of these decisions in the light of the facts detailed herein, clearly appears. The Government cites the decision of Judge Grubb, 218 Fed. 870 with the logic and reasonableness of which I am in wholehearted accord, and also that of Judge Hunt, 222 Fed. 428, which is equally persuasive.

The pleas of immunity of the defendants named are overruled and disallowed.

[File endorsement omitted.]

[fol. 165] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Louis C. Maynard, Clerk of the District Court of the United States in the Fifth Circuit and Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 2267, wherein the United States of America are Plaintiffs and Robert A. Lee, Charles Sherwin and Harry H. Schwarz are Defendants, except that the original writ of error and the original citation in error are included therein, instead of copies thereof, as fully as the same remain on file and of record in my said office at Fort Worth, Texas.

Witness my hand officially and the seal of the District Court of the United States for the Northern District of Texas at Fort Worth, this the 3rd day of Aug., 1923.

Louis C. Maynard, Clerk, by G. B. Buckley, Deputy. (Seal.)

[fol. 166] IN UNITED STATES CIRCUIT COURT OF APPEALS

CHARLES SHERWIN and HARRY H. SCHWARZ

versus

THE UNITED STATES OF AMERICA

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by Samuel R. Sayers, Esq., for plaintiffs in error, and Sylvester R. Rush, Esq., Special Assistant to the Attorney General, for defendant in error, was submitted to the Court.

[fol. 167] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed March 11, 1924

WALKER, Circuit Judge:

The plaintiffs in error, (herein called defendants), were convicted on all of the six counts of the indictment, which was found in March, 1923. Five of those counts charged violations of Section 215 of the Criminal Code by using the United States mail for the purpose of executing an alleged scheme to defraud, and the remaining count charged a violation of section 37 of that Code by conspiring to commit the offense charged in the other counts

The assignments of errors are based upon the overruling of demurrers to the indictment and of a motion to quash the indictment, and upon the action of the court in ruling against a claim of immunity made in behalf of defendants.

The assignments of error based on suggested defects in the indictment have not been much insisted on, and are considered to be so devoid of merit as to make unnecessary a discussion of them.

The alleged scheme to defraud involved the organization and promotion of several companies under the guise and in the form of trust estates with principal offices at Fort Worth, Texas, for the pretended purposes of engaging in the production and sale of oil, and engaging in the oil business in general for profit, and the sale of shares or certificates of beneficial interest in said companies. The claim of the defendants that they were immune from prosecution for the offenses charged in the indictment was based on evidence to the following effect: Each of the defendants was connected as an official with and took part in the operations of the companies named in the indictment from the date of the organization thereof up to the time of the trial. They received through the United States mail the following communication, addressed to one of those companies:

"Washington, June 30, 1922, General Lee Development Interests, Edwards Building, Fort Worth, Texas. Sirs: This Commission officially requests under Sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which [fol. 169] you cannot answer immediately please supplement your first statement with seven days upon the receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry.

This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing the information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

The defendants did not reply to that communication. Not long after the receipt of it, J. F. Southworth, a special examiner of The Federal Trade Commission, came to the offices of said companies in Fort Worth and asked for the information called for by the above set out communication and the questionnaire which accompanied it. At first the defendants declined to furnish such information, putting their declination upon the ground that the Federal Trade Commission did not have jurisdiction over said companies, because

they were not corporations. Later, after defendants were advised by their attorney that said companies were under the jurisdiction of the Federal Trade Commission, and after Mr. Southworth had read in the presence of the defendants provisions of the Federal Trade Commission Act pertaining to the penalty for refusing to comply with its demands for information and documents, defendants answered in considerable detail the questions contained in the questionnaire, and also exhibited certain letters to and from the share or unit holders of said companies and certain correspondence relating to adjusted and unadjusted complaints arising out of the sales of shares or units. [fol. 170] The following part of section 9 of the Federal Trade Commission Act (38 St. 722; U. S. Comp. Stat. § 8836 I) was not read in the presence of defendants:

"But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

No subpoena was issued, neither of the defendants was sworn, and none of the statements made by defendants in pursuance of the request or demand of Southworth was under oath. There was uncontradicted testimony to the following effect: None of the evidence presented to the grand jury which found the indictment was obtained from or secured by the Federal Trade Commission, but some of that evidence related to matters which were disclosed by the defendants in compliance with the request or demand of Southworth. The postoffice inspector and the Special Assistant United States Attorney who alone acted for the Government in procuring the presentation of evidence to the grand jury at the time of such presentation were not aware that the matters to which the evidence so presented related had been the subject of consideration by the Trade Commission at all. The presentation of evidence to the grand jury arose out of complaints which came to the notice of said postoffice inspector.

The above set out provision of Section 9 of the Federal Trade Commission Act prescribes the conditions on which amnesty or immunity from prosecution is granted to a natural person who testifies, or produces evidence, documentary or otherwise, before the Commission. For the furnishing of evidence by such a person to come within the terms of that provision, that which is furnished must be [fol. 171] testimony, or evidence, documentary or otherwise, produced "before the Commission in obedience to a subpoena issued by it." Evidence furnished in compliance with a request or demand of an examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision. Bouvier's Law Dictionary (Rawle's Third Revision) gives the following definition of the word "subpœna":

"A process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before a court or magistrate therein named, at a time therein men-

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tioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a subpoena ad testificandum."

The same book gives the following definition of "subpoena duces tecum":

"A writ or process of the same kind as the subpoena ad testificandum, but with a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue."

The provision of Section 9 of the Act conferring power on District courts of the United States in case of contumacy or refusal to obey a subpoena issued indicates that the word "subpoena" as used in the Act was intended to have the above stated meaning. Section 42 of the Act contains the following provision:

"'Corporation' means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members."

The Act confers on the Commission powers to investigate the organization, business, conduct, practices, and management of corporations engaged in commerce, excepting banks and common carriers [fol. 172] subject to the Act to Regulate Commerce; to require such corporations to file with the Commission reports, or answers in writing to specific questions, as to the matters mentioned, and by its duly authorized agent or agents to have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and members and examiners of the Commission are authorized to administer oaths and affirmations, examine witnesses and receive evidence. §§ 6, 8. In view of the provisions of the Act as to the Commission procuring information otherwise than from witnesses acting in obedience to subpoenas issued by it, and as to examiners of the Commission administering oaths and affirmations, examining witnesses and receiving evidence, it is not without significance that the above quoted provision was so framed as to manifest an intention to grant immunity only to a natural person who testifies or produces evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it. There is a marked contrast between the extent of the powers given to the Commission, its examiners and agents, to procure information or evidence and the scope of the provisions requiring a person to attend and testify though the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and as to such a person not being prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence before the Commission in

obedience to a subpoena. The following is the provision of the Act which immediately precedes the one above set out:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or [fol. 173] for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture."

The language of the amnesty or immunity provision, especially when that language is considered in the light of its context, manifests the absence of any intention to grant amnesty or immunity to a person who furnishes evidence without a subpoena to him having been issued by the Commission. It was for the lawmakers to determine whether amnesty or immunity should or should not be granted in order to procure evidence which, without such a grant, might not be obtainable, because of the provision of the Fifth Amendment to the Constitution that "no person shall be compelled in any criminal case to be a witness against himself;" to prescribe the circumstances or conditions under which such grant is to be effective, and to specify the governmental agency or agencies to be intrusted with the power of determining whether evidence shall or shall not be sought or procured when a result of procuring it will or may be to render the person furnishing it immune from prosecution or from being subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence. It is incumbent on one claiming immunity from prosecution for criminal misconduct to bring himself within the terms of a law granting that privilege. The privilege conferred by the provision in question cannot properly by construction be enlarged beyond that which the language of the provision granting it naturally and legally imports. *Charles River Bridge v. Warren Bridge*, 11 Peters 420, 543; *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 685. Provisions of the Act creating offenses or failure to produce evidence, especially the one of Section 10 as to [fol. 174] any person who neglects or refuses to testify, or to produce documentary evidence, if in his power to do so, in obedience to a lawful requirement of the Commission, being guilty of an offense, have been referred to as indicating an intention to coerce the furnishing of evidence, though self incriminating, by a person not acting in obedience to a subpoena issued by the Commission. Those provisions cannot properly be given the effect of making the meaning of the immunity provision different from that expressed by its language. To the extent that any provision of the Act may have been meant to have the effect of requiring any person to furnish evidence tending to incriminate him, without his acquiring any immunity by so doing, such provision is rendered ineffective by the above quoted provision of the Fifth Amendment. *Counselman v. Hitchcock*, 142 U. S. 547.

The above indicated conclusion is corroborated by the history of an earlier enactment upon which the one now in question evidently was modeled. The Act approved February 11, 1893, entitled "An Act in relation to testimony before the Interstate Commerce Commission," etc., contained the following:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding." U. S. Comp. Stat. § 8577.

The just quoted provision was made to apply to proceedings provided for by the Act entitled "An Act to establish the Department of Commerce and Labor," approved February 14, 1903. 32 Stat. 827. In the case of *United States v. Armour & Co.*, 142 Fed. 808, it was decided, on March 21, 1906, that under the last mentioned provision a person who appeared before the Commissioner of Corporations on his demand or by his request, and gave testimony, al-[fol. 175] though not sworn, was entitled to the immunity provided for by the provision mentioned. Soon after that decision was rendered, and following the action of the President in calling it to the attention of Congress, (4 Wigmore on Evidence, 2nd Ed. § 2282, p. 962), it was provided by an Act approved June 30, 1906, that under the immunity provisions last mentioned "immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." 34 Stat. 798; U. S. Comp. Stat. §8580. The just quoted Act very clearly discloses the unwillingness of Congress to permit, in the cases then dealt with, the acquisition of immunity by one who furnishes evidence without being subpoenaed and sworn. We think that with equal clearness the immunity provision now in question, which is quite similar to those dealt with in the Act last quoted, discloses the absence of any intention to permit the acquisition of immunity by a person furnishing information or evidence otherwise than by testifying, or producing evidence, documentary or otherwise, "before the Commission in obedience to a subpoena issued by it." The provision was so framed as to create safeguards against immunity being conferred unintentionally or as the result of action by anyone not vested with authority to determine whether evidence desired shall be procured at the risk of the furnisher of it acquiring immunity from prosecution for criminal misconduct.

The conclusion is that the defendants did not become entitled to immunity as a result of what the above mentioned evidence showed was done by them; and that the court did not err in so ruling.

The judgment is affirmed.

fol. 176] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

# JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed March 29th, 1924

to the Honorable Judges of said Court:

We omit a formal statement of the nature and result of this cause, the same was fully set out in our brief. (For brevity purposes, the plaintiffs in error will be called the defendants, and the defendant in error will be called the Government.)

The defendants were convicted on all the six counts of the indictment, which was returned in March, 1923. Five of these counts charged violation of Section 215 of the Criminal Code by using the United States mails for the purpose of executing an alleged scheme to defraud, and the remaining count charged violation of fol. 178] Section 37 of the Criminal Code, by conspiring to commit the offenses charged in the other counts. Among other things as is fully shown by the record and defendants' brief on file herein), these defendants filed their plea of immunity in bar of the Governments right of prosecution under said indictment, because of defendants having furnished to the Federal Trades Commission, compulsory evidence, documentary and otherwise, under Article 8836 and the several subdivisions thereunder.

Defendants were operating Three (3) Companies, to-wit, General Lee Interests No. 1, General Lee Interests No. 2, and General Lee Development Interests, and the defendants Sherwin and Schwarz were trustees of and for each of these respectively named companies, which were being operated under declarations of trust on file in Tarrant County, Texas.

In prescribing the powers of the Federal Trade Commission, among other things it is provided in Article 8836-f of the United States Compiled Statutes, that the commission shall also have power—

"(2). Reports by Corporations.—(b) To require, by general or

special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under [fol. 179] oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

It is also provided among other things by Article 8836-i of said Statutes, that—

"Access by Commission to Documentary Evidence; Compelling Attendance and Testimony of Witnesses and Production of Documents.—For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person [fol. 180] son to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof. \* \* \*

"No person shall be excused from attending and testifying or from

producing documentary evidence before the commission, or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Article 8836-j of said Statute, among other things provides:

"Neglect or Refusal to Attend and Testify or to Produce Documentary Evidence; False Entry in Report or in Accounts of Corporation. [181] Neglect or Refusal to Make Entries in Such Accounts; Removal or Mutilation of Documentary Evidence; Failure of Corporation to File Report.—Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000.00 nor more than \$5,000.00, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, a false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, a false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation, in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, [182] to a fine of not less than \$1,000.00 nor more than \$5,000.00, or to imprisonment for a term of not more than five years, or to both such fine and imprisonment."

The defendants received through the United States mail, the following:

"Washington, June 30, 1922.

General Lee Development Interests, Edwards Building, Fort Worth, Texas.

SIRS: This Commission officially requests under Sections 5, 6, 9 and 10 of the Federal Trade Commission Act, that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you cannot answer immediately please supplement your first statement within seven days upon the receipt of this letter. The commission will consider application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry.

"This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing the information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein.

Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

The record shows that the defendants did not reply to the above communication. [fol. 183] That not long after its receipt by the defendants, John F. Southworth, a special examiner of the Federal Trade Commission, came to the offices of the defendants in Fort Worth, Texas, and demanded the information called for by the above set out communication and the questionnaire which accompanied it. At first the defendants declined to furnish such information, putting their declination upon the ground that the Federal Trade Commission did not have jurisdiction over said companies, because they were not a corporation. Later, after the defendants were advised by their attorney that said companies were under the jurisdiction of the Federal Trade Commission, and after Mr. Southworth had read in the presence of the defendants provisions of the Federal Trade Commission Act pertaining to the penalty for refusing to comply with its demands for information and documents, defendants answered in considerable detail, the questions contained in the questionnaire, and also exhibited certain letters to and from the share or unit holders of said companies, and certain correspondence relating to adjusted and unadjusted complaints arising out of the sales of the shares or units, copies of the declarations of trust, copies of contracts, copies of leases, showed him the records of their books, gave him a list of the stockholders (see record page 65 et seq.).

The Court in its opinion, in the latter part thereof on page three says:

"There was uncontradicted testimony to the following effect: None of the evidence presented to the grand jury which found the indictment, was obtained from or secured by the Federal Trade Commission, but some of that evidence related to matters which were disclosed by the defendants in compliance with the request or demand [fol. 184] of Southworth. The Postoffice Inspector and the Special Assistant United States Attorney who alone acted for the government in procuring the presentation of evidence to the grand jury at the time of such presentation were not aware that the matters to which the evidence so presented related had been the subject of consideration by the Trade Commission at all."

The record discloses that no subpoena such as is commonly issued out of the courts was served up on the defendants, no such process as is commonly known as a subpoena was served upon defendants. This Court held—

"That no subpoena was issued, neither of defendants was sworn, and none of the statements made by defendants in pursuance of the request or demand of Southworth was under oath."

In construing the above quoted sections of the Statutes, this Court held that in order for the defendants to have been entitled to immunity from prosecution and punishment under said law, that it was necessary that they should have furnished the documentary evidence and otherwise, which they gave, in obedience to a subpoena issued by the Commission. On page four of the opinion, the Court used this language:

"Evidence furnished in compliance with a request or demand of the examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision."

The Court erroneously held that no subpoena was issued by the Federal Trade Commission to the defendants. The word "subpoena" by etymology, signifies an order with a penalty for disobedience. Cited in Words and Phrases, Vol. 7, page 6720. The communication from the Federal Trade Commission hereinbefore set out, [fol. 185] manding certain information, and the answering of the questionnaire calling the attention of the defendants to the fact that if they refused to answer the same they would be subjected to the fines, imprisonment and penalties of the Statute hereinbefore quoted, the submit was in effect a subpoena such as is contemplated by the statutes. This Court in defining the word "subpoena," quotes with approval from Bouvier's Law Dictionary, as follows:

"A process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before

a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a "subpœna ad testificandum."

Then this Court quotes with approval, the definition of "subpœna duces tecum" as follows:

"A writ or process of the same kind as the subpœna ad testificandum, but with a clause requiring the witness to bring with him and produce to the Court, books, papers, etc., in his hands, tending to elucidate the matter in issue."

And after quoting the two aforesaid definitions of "subpœna," this Court uses the following language:

"The provision of Section 9 of the Act conferring power on district courts of the United States in case of contumacy or refusal to obey a subpœna issued, indicates that the word "subpœna" as used in the Act was intended to have the above stated meaning."

In the case of *Wilson vs. United States*, in 221 U. S. on page 776 thereof, the Supreme Court uses the following language:

[fol. 186] "But the question is also presented whether the subpœna was unauthorized, and hence void, because it was not directed to an individual, but to a corporation. It is urged that its form was unusual and unwarranted, in that it did not require anyone to attend and to testify, but simply directed a corporation which could not give oral testimony, to produce books.

While a subpœna duces tecum ordinarily contains the ad testificandum clause, this cannot be regarded as essential to its validity. The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpœna duces tecum was adequate for this purpose."

This decision is a lengthy discussion of what constitutes a "subpœna duces tecum" and for brevity we therefore refer to same for the entire discussion of the subject, rather than to set it out in full at this time.

This Court erred in holding that there was no subpœna issued and served upon the defendants, as appears in the hereinbefore quoted opinion of the Court, for under the authority of the *Wilson* case supra, the ad testificandum clause was not necessary in the summons or demand, to constitute the instrument sent to the defendants by the Federal Trade Commission, a subpœna. Should this Court be correct in its decision that the instrument sent to the defendants by the Federal Trade Commission did not constitute a subpœna, then this Court is in error in holding, as it did, that "evidence furnished in compliance with a request or demand of an examiner of the Com-

mission, without the issuance of a subpoena to the person furnishing [fol. 187] such evidence, is not within the terms of the provision." The Statute provides:

"That no person shall be excused from attending and testifying or from producing documentary evidence before the Commission, or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture."

This Court in construing this Section of the law, used the following language:

"The language of the amnesty or immunity provision, especially when that language is considered in the light of its *context*, manifests the absence of any intention to grant amnesty or immunity to a person who furnishes evidence without a subpoena to him having been issued by the Commission. It was for the law-makers to determine whether amnesty or immunity should or should not be granted in order to procure evidence which, without such a grant, might not be obtainable, because of the provision of the Fifth Amendment to the Constitution, that 'no person shall be compelled in any criminal case to be a witness against himself.'"

The Statute hereinbefore quoted, require the defendants under the penalties of the Statute whether in obedience to a subpoena, or in lawful inquiry of the Commission, to produce evidence, documentary or otherwise, and upon refusal to do so, in either case would subject them to penalties and forfeitures. This Court erroneously held, that it was for the law-makers to determine whether amnesty or immunity should or should not be granted in such a case. [fol. 188] The Supreme Court in the case of *Brown vs. Walker*, 190 U. S. 644, in which the Supreme Court was discussing immunity from prosecution on account of evidence given before the Interstate Commerce Commission, quotes with approval from the case of *the State vs. Nowell*, 58 N. H. 314, as follows:

"The Legislature, having undertaken to obtain the testimony of a witness without depriving him of his constitutional privileges of protection, must relieve him from all liability on account of the matters which he is compelled to disclose; otherwise, the Statute would be ineffective."

In the case of the *United States vs. Armour & Company*, 142 Federal, 808, on page 821 thereof, there is used this language:

"Congress, by the immunity laws in question, and by each of them, has taken away the privilege contained in the Amendment, and it is conceded in argument, that this cannot be done without giving to the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed."

In this same case, it is further held on page 808:

"But it is insisted by the Government, that they had not given under compulsion, because they did not give under what is known in the law, as a testimonial compulsion, and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. \* \* \* The subpoena is not necessary where the person is present in Court, or within the verge of the Court. The only object of the subpoena is to secure the attendance. It is superfluous when he is present, without subpoena. \* \* \* I am clearly of the opinion that the best judgment to be had from all of the authorities, [fol. 189] is, that the subpoena is a useless and superfluous thing after the tribunal and witness are together. And I am also of opinion that, under these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admission against interest and against the party producing them."

Congress is without authority under the Fifth Amendment to the Constitution, to require a witness to testify against himself, unless full and complete immunity be granted.

Congress is without authority to require a witness in obedience either to a subpoena or other lawful inquiry, to produce evidence documentary and otherwise, that would incriminate him, and then limit the right of the witness to immunity, only when in obedience to a subpoena he gives such evidence, documentary or otherwise.

The Appellate Court says, in discussing the immunity clause of the Federal Trade Commission Act in question, that:

"We think that with equal clearness the immunity provision now in question, which is quite similar to those dealt with in the Act last quoted, discloses the absence of any intention to permit the acquisition of immunity by a person furnishing information or evidence otherwise than by testifying, or producing evidence documentary or otherwise, 'before the Commission in obedience to a subpoena issued by it.' The provision was so framed as to create safeguards against immunity being conferred unintentionally or as the result of action by anyone not vested with authority to determine whether evidence desired shall be procured at the risk of *the risk* of the furnisher of it [fol. 190] acquiring immunity from prosecution for criminal misconduct."

This construction is erroneous, in that it limitse the protection of a citizen to that which is less than that guaranteed to him under the constitution. (Fifth Amendment U. S. Constitution.)

For all of the reasons stated, the defendants Charles Sherwin and Harry Schwarz, respectfully pray that your Honors grant them a rehearing of this case, and that the same be reversed and dismissed, and in the event that cannot be done, that the same be reversed and remanded for a new trial, as they will ever pray.

Respectfully submitted, McLean, Scott & Sayers, Attorneys  
for Plaintiff in Error.

[fol. 191] Jurat showing the foregoing was duly sworn to by Sam R. Sayers omitted in printing.

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[fol. 192] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

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[fol. 193] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 166 to 192 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4201, wherein Charles Sherwin and Harry H. Schwarz are plaintiffs in error, and The United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 165 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 7th day of April, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of the United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 194] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Circuit Court  
of Appeals for the Fifth Circuit

On consideration of the petition for a writ of certiorari herein to  
the United States Circuit Court of Appeals for the Fifth Circuit, and  
of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and  
the same is hereby, granted, the record already on file as an exhibit to  
the petition to stand as a return to the writ.

June 9, 1924.

(3678)

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U.S. DEPT. OF JUSTICE  
FILED  
MAY 9 1924  
WM. A. STANSBURY  
CLERK

No. 1012 377

**In the SUPREME COURT of the UNITED STATES**

**OCTOBER TERM 1923**

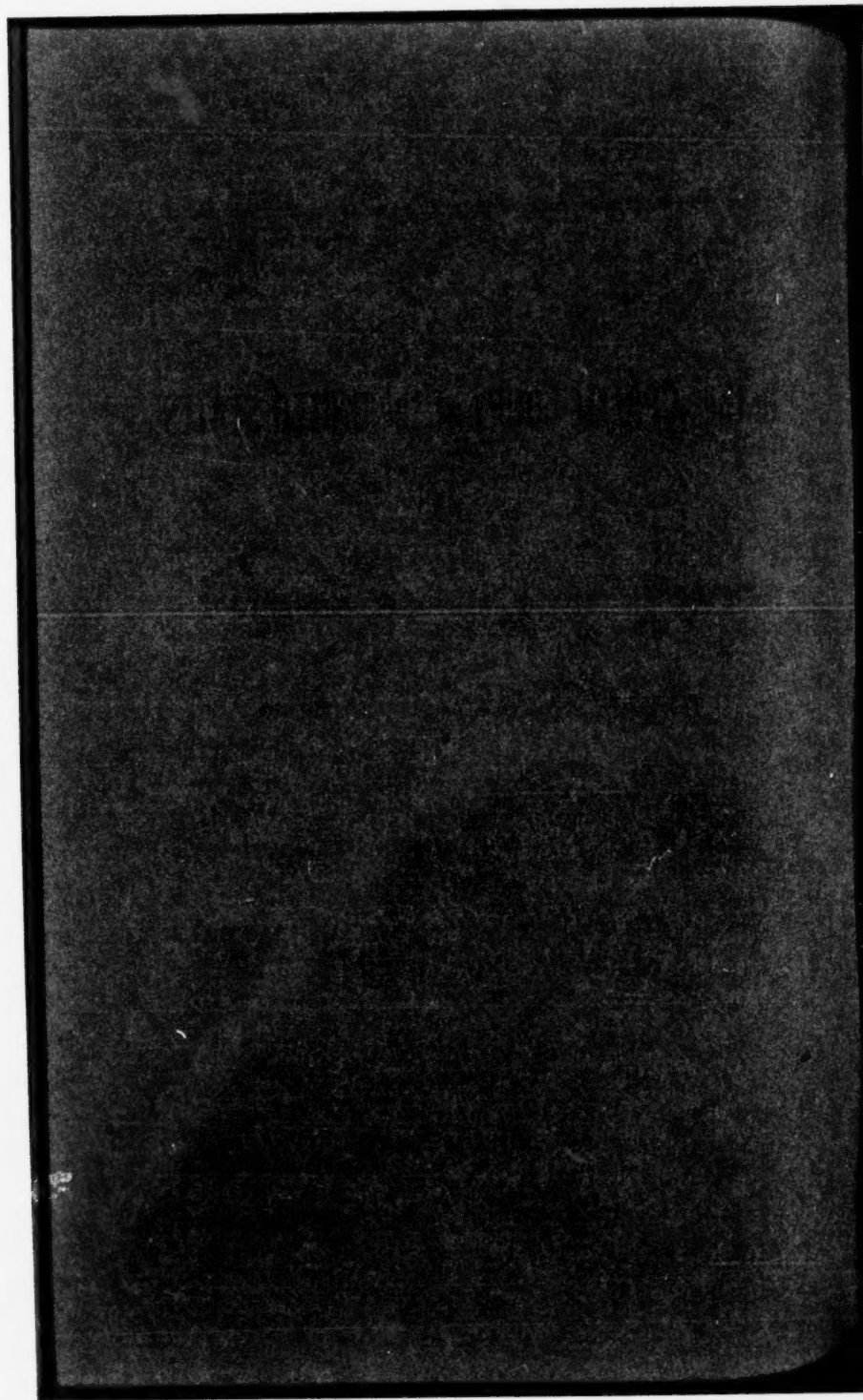
**CHARLES SHEPWIN and HARRY H. SCHWARZ,**  
Petitioners.

vs.

**THE UNITED STATES OF AMERICA,**  
Respondent.

**PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

**W. P. McLEAN, JR.,  
WALTER B. SCOTT,  
Attorneys for Petitioners,  
Fort Worth, Texas.**



# In the SUPREME COURT of the UNITED STATES

OCTOBER TERM 1923

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CHARLES SHERWIN and HARRY H. SCHWARZ,  
Petitioners,

vs.

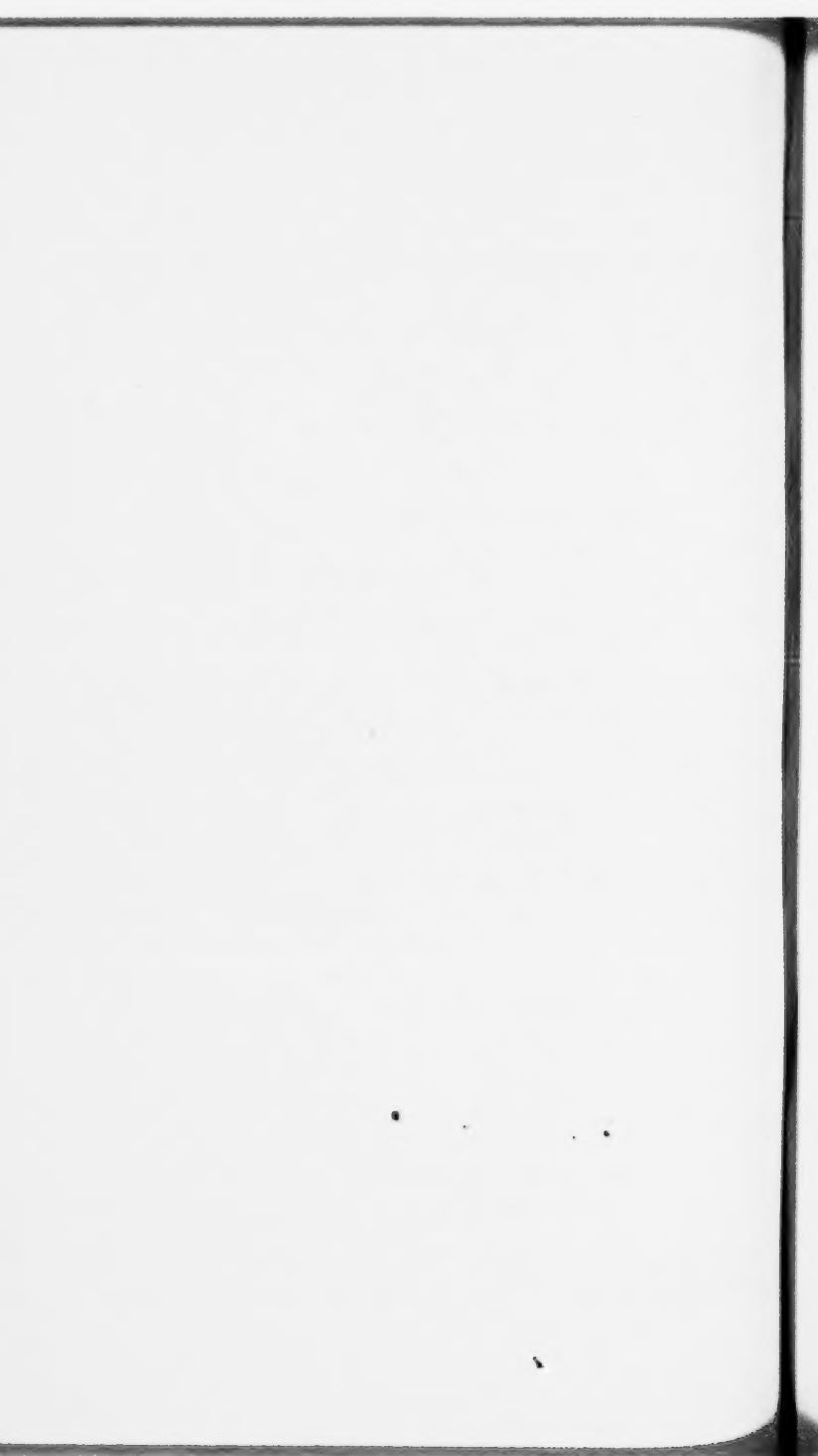
THE UNITED STATES OF AMERICA,  
Respondent.

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Now comes Charles Sherwin and Harry H. Schwarz, by and through their counsel W. P. McLean, Jr., and Walter B. Scott, and move this Honorable Court that it shall, by certiorari or other proper process directed to The Honorable, The Judges of the United States Circuit Court of Appeals of the Fifth Circuit, require said court to certify to this court for its review and determination, a certain case in said Circuit Court of Appeals, lately pending, wherein the respondent The United States of America was defendant in error and your petitioners Charles Sherwin and Harry H. Schwarz were plaintiffs in error, and said petitioners herewith tender their petition and brief, together with filed and certified copy of the record in said cause in said Circuit Court of Appeals.

W. B. Scott

Fot Worth, Texas.  
Counsel for Petitioners.



No. ....

# In the SUPREME COURT of the UNITED STATES

OCTOBER TERM 1923

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CHARLES SHERWIN and HARRY H. SCHWARZ,  
Petitioners,

vs.

THE UNITED STATES OF AMERICA,  
Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

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*To the Honorable Chief Justice, and Associate Justices  
of the Supreme Court of the United States:*

Come now Charles Sherwin and Harry H. Schwarz, citizens of the United States, and petition Your Honor for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Circuit, in cause No. 4201, styled Charles Sherwin and Harry H. Schwarz, plaintiffs in error, vs. The United States of America, defendant in error, and for same would show:

That an indictment was filed on the.....day of..... 1923, in the United States District Court for the Northern District of Texas, and in the Fort Worth Division, against the petitioners and others, which indictment contains six counts; the first five of said counts charge an offense under Section 215 of the Criminal Code, that of devising and attempting to devise a scheme and artifice and the using of the United States mail in the further-

ance of said scheme. The scheme in each of the counts of the indictment was the same, and are as follows:

"That said defendants would organize and promote divers oil companies and sell the shares thereof, to-wit: General Lee Interests No. 1, divided into 1,250 shares of the par value of \$20.00 each, General Lee Interests No. 2, divided into 900 shares of the par value of 20.00 each, General Lee Development Interests, divided into 250,000 shares of the par value of \$1.00 each, and divers other similar concerns to the grand jurors unknown, all under the guise and in the form of trust estate and with principal offices at Fort Worth, Texas, for the pretended purpose of engaging in the production and sale of oil and gas leases and engaging in the oil business in general, for profit, and that they would issue large amounts of shares or certificates of beneficial interest in said companies and that they would sell the same to any and all of said persons to be defrauded whom they could induce to purchase said shares or certificates by making false and fraudulent representations, pretenses and promises concerning said companies, and also as to the standing, character and qualifications of the defendant Robert A. Lee, and concerning very large dividends and profits at an early date to their shareholders of certificate of interest holders and that such false and fraudulent representations, pretenses and promises would be made by said defendants and their sales agents, both orally and by written and printed matter advertisements and publications, in order to induce said persons to be defrauded to purchase beneficial interest in said companies, such representations to be made through and by means of newspapers, magazines, and other publications, and in form of posters, circulars, pamphlets and circular letters and personal correspondence, all of which said matter was and would be sent to said persons to be defrauded, for the purpose of inciting and inducing said

persons to purchase said shares or beneficial interests in said companies, and to pay over their money and property to the said defendants, in order that they, the said defendants, might fraudulently appropriate and convert large portions thereof, to their own use and benefit.

And the said defendants planned and schemed, that for the purpose of so inciting and inducing said persons to be defrauded to deliver over to them, the said defendants, their money and property, they, the said defendants, would make false and fraudulent pretenses, representations and promises, in substance and in effect, as follows, to-wit:"

and then followed a great number of the alleged false and fraudulent representations, covering about eight pages of the record.

Then, in each of the counts is set out a letter, which is charged to be the overt act of using the mails in furtherance of the alleged scheme. The sixth count of the indictment charged a conspiracy to do and cause to be done the divers offenses charged against the petitioners in the divers counts from one to five, and certain overt acts alleged in the indictment comprising principally the mailing of letters which are set out in the indictment.

To this indictment petitioners filed and presented a plea in bar or plea of immunity, in which they alleged in substance that they were connected as officers with certain companies, known as General Lee Interests No. 1; General Lee Interests No. 2, and General Lee Development Interests, and were so connected prior to the time they were indicted by the grand jury, and that while they were so connected one John F. Southworth, who was either a member of the Federal Trade Commission or one of its duly authorized agents, came to the offices

of the company, and to these petitioners, and demanded to know of them why they had not answered a letter he had addressed to them, or that the Federal Trade Commission had addressed to them, seeking certain information with reference to the General Lee Interests, and that while at the offices the said John F. Southworth, as the Federal Trade Commission, or as one of its officers, demanded of petitioners that they furnish him the information he sought with reference to these General Lee Interests, and under threat and coercion, compelled these petitioners to give him the information he sought. That at first petitioners refused to give the information, but their attorney having been summoned and the said John F. Southworth having read the Federal Trade Commission law to the attorney of the petitioners, and to the petitioners, convinced said attorney that petitioners were subject to the Federal Trade Commission law, and that they were compelled to furnish to him (Southworth) the information he had demanded, and the attorney for petitioners advised petitioners that they were committing a crime if they refused to deliver the information and furnish any evidence Mr. Southworth sought.

That before this conference, petitioners had received a letter, to which they did not reply, but which letter dated June 30, 1923, addressed to the General Lee Development Interests, and read in part, "The Commission officially requests, under sections 5, 6, 9 and 10 of the Federal Trade Commission Act, that you report to it and furnish at once information called for by the annexed schedule. \* \* \* Your attention is respectfully called to the penalties provided in section 10 of the Federal Trade Commission Act for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry;" and this was the letter that petitioners had received, and which they had failed and refused to answer that Mr. Southworth inquired

about when he came to the office, and after Mr. Southworth had convinced the attorney of petitioners and petitioners that they were compelled to answer his questions and furnish him information and furnish him documents, that he sought, petitioners then furnished him everything that he desired. They said that he came to the offices about six times before they were convinced that they were compelled to furnish him information, and after that he came there about twenty times; they carried him out over the properties of the companies; that they furnished him everything he asked for; that he made copies of their declarations of trust, contracts, leases, and that he demanded of them their correspondence with reference to their dissatisfied stockholders, and that they furnished all of these things to him; that he left their office finally with many of these copies in his portfolio which he carried away with him. They say they furnished him everything that he requested, declaration of trust, copies of contracts, copies of leases, showed him records of the books, gave him a list of the stockholders, some of the correspondence which they had with stockholders, and Mr. Southworth read that and made notes as he went along; that he had copies made of any document that he wanted; that there was a contract between Mr. Lee and Mr. Schwarz and Mr. Sherwin and that Mr. Southworth demanded that and it was furnished him; in fact they surrendered to him everything that he demanded; that the records they gave him were from their files and offices; that when he left their offices and the city, after he had visited their offices about twenty times, he carried with him this information and copies of instruments.

Petitioners say that before they gave up any information to him, Mr. Southworth read the law to them and their attorney, and he claimed that petitioners were violating the law in refusing to furnish him the informa-

tion, and that he had authority as an official of the Federal Trade Commission to demand the information and receive the same, and that being convinced that they were compelled to give him this information, and that they would be guilty of a penal offense if they did not furnish him the information, and upon advice of their attorney to that effect, and the representation of Mr. Southworth to that effect, they furnished him the information, and that this information was about and concerning the matters and things for which they were indicted for using the mails to defraud with reference to the operation and promotion of the General Lee Interests, and they were then about to be tried upon this indictment.

Mr. Sherwin testified at length before the court, all of which is fully set out in the record, the above being the substance of his testimony, and it was agreed that Mr. Harry H. Schwarz, the other petitioner, would testify to the same facts.

It was further agreed, for the purpose of the record, that the government exhibits 1, 2 and 3, the same being the declarations of trust of the General Lee Interests No. 1, General Lee Interests No. 2, and General Lee Development Interests respectively, which are fully set out in the record, were introduced by the government in the trial of the case on its merits, and were identical copies of each of the documents, and are the same ones which the petitioners Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission. That the government's exhibit No. —, the same being the contract between the General Lee Development Interests, through its trustees as the first parties and Sherwin, Schwarz and Lebenssen as second parties, of date April 12, 1922, and the same containing a copy of the agreement by and between R. A. Lee and

Sherwin and Schwarz concerning the compensation of the said Robert A. Lee for his services in said company (copy of which is also in the record) is the same identical contract of which the defendants Sherwin and Schwarz testified that they gave copies to John F. Southworth, and that said contracts were not of record, and that the last mentioned exhibit was introduced by the government in the trial of this case on its merits.

The plea in bar, or plea of immunity, was presented to the court, and a hearing was had thereon, both by the testimony of petitioners and the introduction of exhibits, and the court, after hearing the same, refused and denied said plea in bar and plea of immunity, to which action of the court the petitioners excepted and preserved their said exception by assignment of error.

Thereafter, a trial was had before the court and jury upon the merits of the case, and upon this trial, the petitioners read and presented their plea of immunity and plea in bar to the jury, and all of the testimony that was introduced before the court was again introduced before the court and jury, and the petitioners then requested the court to instruct the jury to return a verdict of not guilty in this case, under each of the counts in the indictment, which instruction was as follows:

"Gentlemen of the Jury: You are instructed to return a verdict of not guilty against the defendants Charles Sherwin and H. H. Schwarz upon their plea of immunity, and the form of your verdict shall be: We, the jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty." (Tr. 130.) Which requested instruction was by the court refused, to which the petitioners excepted, and preserved their exception by assignment of error. (Tr. 130; 138, Assignment No. 4.)

Before the court charged the jury, petitioners request-

ed and moved the court to submit to the jury, in appropriate language, and in terms of law, the issue of immunity as raised by their plea in bar, filed in this cause, and permit said jury to pass on same separately and apart from the issue of "guilty or not guilty", as raised by the averments in the indictment and their plea of not guilty thereon, which motion the court refused, (Tr. 130-131) to which action the petitioners excepted and preserved their exception by assignment of error. (Tr. 138-139).

Before the court charged the jury, petitioners prepared special charges upon the plea and issue of immunity, and requested the court to charge the jury as therein set forth, as follows:

Requested Charge No. —

"You are instructed that, under the law, the Federal Trades Commission, or any of its duly authorized agent or agents, has the authority to demand of any corporation or common law trust, by making demand upon those natural persons in charge thereof, to answer any lawful inquiry so made by said Commission, or its said agent or agents, and to attend and testify, and to answer any lawful inquiry and to produce documentary evidence if in his power to do so in obedience either to the subpoena or lawful requirement of said Federal Trade Commission, and this authority such Federal Trades Commission and its duly authorized agent or agents possess under the law, even to the extent of requiring such natural persons to give such evidence or furnish such documentary evidence or other information that incriminates such natural person, and shows him or tends to show that he has been guilty of an offense against the laws of the United States. But in this connec-

tion, you are further instructed that such law would not be constitutional unless it further provided, as it does, that no such natural person, after having complied with such lawful demand of the Federal Trades Commission, and given testimony or evidence, or furnished documentary evidence or otherwise, or made answers to any lawful inquiries in obedience to such lawful requirement, shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he so testified or produced evidence, documentary or otherwise, in answer to such lawful demand as aforesaid.

"Now, then, bearing in mind the instructions hereinabove, if you find and believe from the evidence that the defendants, Charles Sherwin and H. H. Schwarz, in answer or compliance either of the subpoena or lawful demand of the Federal Trades Commission, or of one John F. Southworth, as the duly authorized agent of the said Commission, if you so find, and answered a certain questionnaire demanded by the said Federal Trades Commission for this said defendant to answer and furnish to said Southworth the books, records, letters, letter files, advertising matter, exhibit the physical assets of said companies to said Southworth, and generally informed said Southworth of the nature and scope of the business said companies were engaged in, and the kind and character thereof, and copies of the letters it was sending through the United States mails if any such were being sent, and generally, if you find and believe from the evidence that the defendants, Charles Sherwin and H. H. Schwarz, furnished information, documentary or otherwise, to said Southworth, or to the said Federal Trade Commission about any matter, thing or trans-

action charged against said defendant in the indictment herein, or about any matter, thing or transaction introduced in evidence against them in the trial of this case under the indictment herein; or, if you find and believe from the evidence that this defendant furnished to said Federal Trades Commission, in compliance with its lawful demand any evidence, documentary or otherwise, about any matter, thing or transaction tending to incriminate this defendant, or criminating him of the offense charged against him in the indictment herein, then, in either event, you are instructed that in such case the law has provided immunity for this defendant and he cannot be convicted of the offense charged against him in the indictment herein, and you will find the defendant not guilty on the ground that he is immune from prosecution, and conviction, and the form of your verdict will be:

"We, the jury, find the defendant not guilty on the ground that he is entitled to immunity under the law.' "

Requested Charge No. —

"The defendants, Charles Sherwin and H. H. Schwarz have filed herein their plea of immunity, which has been read to you by the court, which in effect is an application on the part of said defendants to have the jury determine whether or not their acts in giving testimony, information and documents of and pertaining to the business and operations of the General Lee Interests One (1) and Two (2) and the General Lee Development Interests to one John F. Southworth, agent of the Federal Trades Commission, as has been detailed in the evidence before you, constitutes, under Article 8836-A

to N, inclusive, immunity to them, and operates to prevent their conviction herein, and in this connection I charge you as follows:

"If John F. Southworth, who it is admitted was the duly constituted agent of the Federal Trade Commission, demanded, required and received of and from the defendants, Charles Sherwin and H. H. Schwarz, testimony, evidence and documents of, belonging to and connected with the operation of the business of the three (3) companies herein mentioned, and required them to answer questions with respect thereto, over the protests and without the consent of the said Charles Sherwin and H. H. Schwarz, and that the said defendants, Sherwin and Schwarz, refused to give said information, testimony and documents until the said Southworth had demanded same under and by virtue of the terms of Article 8836, et seq., then you will acquit the defendants upon their plea of immunity, and say by your verdict, 'not guilty.'"

Which said special charges the court refused to give, to which petitioners excepted and preserved their exception by assignment of error. (Tr. 131-133; 138-142. Assignment No. 5.)

After the testimony had closed, the court instructed the jury generally as to the issues, and upon the question of the petitioners' plea of immunity in this cause, charged the jury as follows:

"The Court: Now, there has also been introduced in this case, gentlemen, a special plea of the defendants Sherwin and Schwarz, claiming immunity from prosecution because of certain transactions had before the Federal Trade Commission, the nature of which are set forth in detail in the evidence stipulated in the case, and which need not be detailed at

this moment. With respect to that plea as indicated by the court the other day in the judgment of the court, there being no question of facts involved, and counsel being of the opinion that there is no question of facts involved, there is no conflicting evidence, it being purely a question of law presented, the court therefore will instruct you, and does instruct you, to return a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the court, and I will ask your foreman before returning into court to sign that verdict." (Tr. 134.)

To which charge in this cause, through their counsel, the petitioners duly excepted, and preserved their exception by assignment of error No. 3. (Tr. 137-138.)

The jury returned a verdict of guilty against petitioners Charles Sherwin and Harry H. Schwarz on each of the six counts of the indictment, which verdict was accepted by the court; (Tr. 58-61) and the court sentenced Charles Sherwin and Harry H. Schwarz each a term and period of five years in the penitentiary on the first count of the indictment; five years on the second count of the indictment; five years on the third count of the indictment; five years on the fourth count of the indictment; five years on the fifth count of the indictment, and two years on the sixth count of the indictment; the first and second counts to run consecutive, and the third, fourth, fifth and sixth counts to run concurrent on each of the defendants with the first and second counts, and a fine of one thousand dollars on each of the first five counts in the indictment and ten thousand dollars on the sixth count. (Tr. 60.)

The petitioners prosecuted their writ of error to the Circuit Court of Appeals for the Fifth Circuit. (Tr. 143-150.)

In the trial court the petitioners duly preserved, and in the prosecution of their writ of error, complained of the action of the trial court, in this:

## 2.

"The court erred in overruling and in not sustaining their plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, which said plea is made a part of this assignment as fully and as complete as though copied herein." (Tr. 137.)

## 3.

"That the court erred in peremptorily instructing the jury to return a verdict against the defendants on the issue of their plea in immunity, and in using the following language with respect thereto:

"Gentlemen of the jury: You are directed to return a verdict against the defendants Charles Sherwin and Harry H. Schwarz on their plea of immunity."

"And the court thereupon caused to be prepared and executed by said jury the verdict against these defendants with respect to said immunity plea, which said verdict of the jury is made a part hereof as fully and complete as if copied herein." (Tr. 137-138.)

## 4.

"The Court erred in refusing to direct the jury to return a verdict of not guilty against each of these defendants on their plea of immunity as was

requested by defendants in writing, which requested instruction is as follows:

**"Requested Instruction No. —**

**"You are instructed to return a verdict of 'not guilty' against the defendants Charles Sherwin and Harry H. Schwarz upon their plea of immunity, and the form of your verdict shall be: We, the jury, find the defendants Charles Sherwin and H. H. Schwarz not guilty.' (Tr. 138).**

**5.**

**"The court erred in refusing to instruct the jury in appropriate language and in terms of law as to the rights of defendants with respect to the issue of immunity as raised by their plea in immunity and the evidence concerning same, as was set forth in defendants' requested charges numbers ..... and ..... as heretofore fully set out in the record." (Tr. 139-142.)**

On the 11th day of March, 1924, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court. (Tr. 167-175.)

The petitioners, in due time, filed their petition for a rehearing (Tr. 177), which was by the court denied on the 4th day of April, 1924. (Tr. 192.)

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

The trial court erred in overruling, and in not sustaining petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special

charge; (Assignment of error Nos. 2 and 4; Tr. 137-138) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that petitioners were summoned (or subpoenaed) by the Federal Trade Commission, and they did answer a lawful inquiry of the Federal Trade Commission, and there was demanded of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these petitioners by virtue of the statute, and they should not have been prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful inquiry, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade

Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

## 2.

The trial court erred in peremptorily instructing the jury to return a verdict against petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 137) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against petitioners on that issue. (Tr. 134.) And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful requirement; and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against petitioners on their plea of immunity.

## 3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the

rights of petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition (Assignment of error No. 5; Tr. 138-142) because the statute gave petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise before the Federal Trade Commission. The petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon and same presented a question of fact, and the court should have given petitioners' requested charges as the same properly presented the law applicable to the issues.

## 4.

The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not, within the terms of the provision of the statute," because this is, in our opinion, an incorrect interpretation of application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, without regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath? The statute says a person can be pun-

ished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any transactions, matters or things concerning which he may testify or produce evidence.

Your petitioners believe that the judgment of the trial court, as well as the judgment of the Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the trial court, is erroneous, and that this Honorable Court should require the case to be certified to this court for review and determination upon the questions raised in conformity with the provisions of the Act of Congress in such cases provided.

Your petitioners, therefore, pray that a writ of certiorari be issued by this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said last named court to certify and send to this court, on a date certain, a full and complete transcript of the record of all proceedings of the Circuit Court of Appeals in this cause, to the end that the cause may be reviewed and determined by this court as provided in such cases; and that your petitioners may have such other and further relief and remedy in the premises as this court may think appropriate and in conformity with law, and that the judgment of said Circuit Court of Appeals in this

cause be reversed and said cause dismissed by this Honorable Court.

W. B. Scott

Fort Worth, Texas.  
Counsel for Petitioners.

THE STATE OF TEXAS,  
COUNTY OF TARRANT.

I, W. B. Scott, being duly sworn, on oath state that I am one of the counsel for petitioners, Charles Sherwin and Harry H. Schwarz in the foregoing petition for certiorari; that I prepared said petition and am familiar with same, and that all the allegations therein are true, as I verily believe.

W. B. Scott

Subscribed and sworn to before me, this 6th day of May, 1924.

Mae C. Sharp

Notary Public, Tarrant County, Texas.

*Journal of Management Education* 30(6)

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**PETITIONER'S BRIEF**



## INDEX

### Argument on the Brief:

Page

(We have presented to the Court all of the specifications of error together as the specifications reflect only one question, that of immunity, and we have presented what we believe an error in failing to sustain the plea and the error of the Court in refusing the special charges thereon) 109-138

### Specifications of Error:

First: .....	105-106
Second: .....	106-107
Third: .....	107-108
Fourth: .....	108-109

### Statement of the Case .....27-105

#### Evidence on Plea of Immunity:

Witnesses .....74-102

Documentary .....102-103

Indictment .....28-65

Plea of Immunity .....65-70

Replication to Plea of Immunity.....70-74

## LIST OF AUTHORITIES

	Page
Brown vs. Walker, 16 Sup. Ct. 644; 40 L. Ed. 819.....	124
Comp. St. Sec. 8836F.....	109; 114; 116
8836I .....	109; 110
8836J .....	109; 118; 124
Counselman vs. Hitchcock, 142 U. S. 547.....	123
Ex Parte Garland, 71 U. S. 333.....	125
Hale vs. Henkel, 50 L. Ed. 652.....	123
Heike vs. U. S., 30 Sup. Ct. 539; 54 L. Ed. 821.....	126
Nelson vs. U. S., 26 Sup. Ct. 358; 50 L. Ed. 673.....	124
State vs. Nowell, 58 N. H. 314.....	125
U. S. vs. Armour & Co., 142 Fed. 808.....	117; 122; 136
U. S. vs. Pardue, 294 Fed. 543.....	132; 136
U. S. vs. Sanborn, 28 Fed. 299.....	117

# In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1923.

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CHARLES SHERWIN and HARRY H. SCHWARZ,  
Petitioners,

vs.

THE UNITED STATES OF AMERICA,  
Respondent.

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(We will set out the indictment against the Petitioners and others, in full, as well as the testimony given by petitioners and the Government, and the agreed statement as to the record, as we deem it necessary for the Court to fully and completely examine and satisfy itself that Petitioners furnished evidence, documentary and otherwise to the Federal Trade Commission about, and concerning the things, matters and transactions they were later indicted for, and were compelled to stand trial for on said indictment, which is this case.)

## STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

That an indictment was filed on the.....day of  
....., 1923, in the United States District Court for the Northern District of Texas, and in the Fort Worth Division, against the petitioners and others, which indictment contained six counts. The first five counts charge a violation of Section 215 of the Criminal Code of the United States, and

the sixth count charged a violation of Section 27, of that code, which indictment was as follows:

(We will omit such formal parts as are unnecessary in the consideration of this case.)

"That heretofore, and prior to the several acts of using the United States Mails hereinafter set forth, Robert A. Lee, Charles Sherwin, Harry H. Schwarz, William Schloss, Phillip Goldstein, and otherwise called Ralph P. Gibson, Robert Ball, Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch, otherwise called M. Haas, and Walter Marks, (all hereinafter in this indictment called defendants) had devised and intended to devise a scheme and artifice to defraud and to obtain money and property by false and fraudulent pretenses, representations and promises from Alice M. Kane, A. L. Skanas, J. H. Bohmfalk, A. S. McDougal, Violet R. Bowen, and various and divers other persons whose names are to the Grand Jurors unknown, and the public generally (a class of persons not susceptible by reason of their great number, and want of information on the part of the Grand Jurors of all being named herein), said persons being hereinafter referred to as the persons to be defrauded, and to obtain money and property from said persons to be defrauded by means of false and fraudulent pretenses, representations and promises; the said scheme and artifice being in substance as follows, to-wit:

"That the said defendants would organize and promote divers oil companies and sell the shares thereof, to-wit: General Lee Interests No. 1, divided into 1,250 shares of the par value of \$20.00 each; General Lee Interests No. 2, divided into 900 shares of the par value of \$20.00 each; General Lee Development Interests, divided into

250,000 shares of the par value of \$1.00 each, and divers other similar concerns to the Grand Jurors unknown, all under the guise and in form of trust estate and with the principal offices at Fort Worth, Texas, for the pretended purpose of engaging in the production and sale of oil and the sale of oil and gas leases and engaging in the oil business in general, for profit, and that they would issue large amounts of shares or certificates of beneficial interest in said companies and that they would sell the same to any and all of said persons to be defrauded whom they could induce to purchase said shares or certificates by making false and fraudulent representations, pretenses and promises concerning said companies and also as to the standing, character and qualifications of the defendant Robert A. Lee, and concerning very large dividends and profits at an early date to their shareholders of certificate of interest holders and that such false and fraudulent representations, pretenses and promises would be made by said defendants and their sales agents, both orally and by written and printed matter advertisements and publications in order to induce said persons to be defrauded to purchase beneficial interest in said companies, such representations to be made through and by means of newspapers, magazines, and other publications, and in form of posters, circulars, pamphlets and circular letters and personal correspondence, all of which said matter was and would be sent to said persons to be defrauded, for the purpose of inciting and inducing said persons to purchase said shares or beneficial interests in said companies, and to pay over their money and properties to the said defendants in order that they, the said defendants, might fraudulently appropriate and

convert large portions thereof, to their own use and benefit.

"And the said defendants planned and schemed that for the purpose of so inciting and inducing said persons to be defrauded to deliver over to them, the said defendants, their money and property, they, the said defendants, would make false and fraudulent pretenses, representations and promises, in substance and in effect as follows, to-wit:

"(1) That the said companies were under personal and complete management and direction of General Robert A. Lee; that the said General Robert A. Lee was a descendant of Robert E. Lee, the great Confederate general, and of the historic Lee family; that as General Robert E. Lee gave his life to the cause of the South so now was General Robert A. Lee giving his life to the oil industry and the great cause of humanity; whereas, in truth and in fact, as the said defendants then and there well knew the said companies were not under the personal and complete direction of the said Robert A. Lee but were controlled and dominated by the defendants Charles Sherwin and Harry H. Schwarz, who had procured and associated with themselves the said Robert A. Lee for the purpose of using the historic name of the Lee family, and his pretended relationship with the great Confederate general, Robert E. Lee in order to appeal the more strongly to the persons to be defrauded and thereby incite and induce the said persons to be defrauded to purchase the shares or beneficial interests in the said companies; and the said Robert A. Lee was not in fact a descendant of the said Confederate General, Robert E. Lee, nor of the historic Lee

family, nor was he giving his life to the oil industry or the cause of humanity, but was only helping to promote a fraudulent scheme.

"(2) That the said General Robert A. Lee was known far and wide as a great geological engineer; that he was a man of long and successful experience as a petroleum geologist; that he was in fact a miracle man of geology; that he had made fortunes for others by the location of scores of producing oil wells in California; in Oklahoma, and in various fields of Texas, and among geological men was revered and admired; Whereas, in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee was not known far and wide as a great geological engineer nor as a geological engineer at all and he was not a man of long successful experience as a petroleum geologist or of any experience whatever as such geologist; he was not in fact a miracle man of geology nor had he made fortunes for others by the location of scores of producing oil wells in California, Oklahoma, and Texas, or in any of those states, nor was he revered or admired among geological men or of any repute whatever among such class of men but was in fact a laborer without expert knowledge and never known to the public as a geologist.

"(3) That the said General Robert A. Lee had been in the employ of the richest and biggest interests whose names are a by-word in the financial world and had helped thousands to make fortunes; that he had never bought a piece of acreage for a client, that had not been productive and had never made a location for an oil well that had not come in a successful producer of oil; Whereas, in truth and in fact, as the defendants

then and there well knew, the said defendant Lee had not been in the employ of the richest and biggest interests known to the financial world or helped others to amass fortunes but in fact loaned his name to said scheme for \$11.50 per week, and had theretofore been employed as janitor in the state capitol of the State of Idaho, and was not and is not a locator of oil wells.

“(4) That the said General Robert A. Lee, in behalf of General Lee Interests No. 1, had invaded the Mexia fields and had found the Mexia mother pool and was offering his friends the opportunity of enlisting in his young army of future millionaires; that he, the said General Robert A. Lee, who had never located a dry hole, was offering this chance to profit with him in his mother pool leases; Whereas, in truth and in fact, as the said defendants then and there well knew the said defendant Lee had not found the mother oil pool in the Mexia field or any other oil field, and the alleged army of millionaires was only a myth invented by the said defendants in promoting the said scheme, and the said defendants had no opportunity of profit to offer to anyone in any alleged pool leases, but in fact were promoting wild-cat and semi-wild-cat territory procured by the said defendants at about \$5.00 per acre.

“(5) That he, the said General Robert A. Lee, for General Lee Interests No. 1, had purchased three leases in the district where he had found the said mother pool; that the said three leases aggregated 200 acres of land; that these 200 acres were to cost only \$25,000 (twenty-five thousand dollars), and that he had already paid a portion thereof himself that it was only through his personal influence that he was able to get

this marvelous acreage at such a ridiculously low price and that he was offering his friends the opportunity of sharing his good fortune with him; Whereas in truth and in fact, as the said defendant then and there well knew, that he, the said Robert A. Lee had not himself purchased the said three leases composing the acreage for General Lee Interests No. 1, and had not paid Twenty-five Thousand Dollars therefor, nor any portion thereof himself, and it was not true that this acreage was acquired at a ridiculously low price through his personal influence and he was not offering his friends the opportunity of sharing good fortune with him but only to invest their money in a questionable and highly speculative enterprise.

“(6) That this was the first time General Lee had asked his friends for money to assist him in his operations; that he was positively not a promoter; that he knew nothing about these so called promotion schemes and wanted to know even less about them; that he was just a plain, honest-to-goodness man who had been the instrument used by the big companies to locate oil; that he has enough money to provide for himself and if he had made for himself only a percentage of the profits that he had made for others he would be worth millions and that now he was determined to let the world share in these riches and vast wealth that would be forthcoming when the drill should prove that his knowledge of the oil structure of Texas was far superior to that of any geologist who had ever traced a structure; Whereas in truth and in fact, as the defendants well knew, the said Robert A. Lee had joined in this promotion scheme and loaned his name and alleged family history to the

same to be used by the said defendants in the promotion of the said scheme; and the said Robert A. Lee had never been used by big companies to locate oil wells, and had not made millions for others and had no superior knowledge of oil structure or any scientific knowledge thereof whatever, but was an impecunious old man who had joined the other defendants herein in the said scheme and artifice for a small sum which they were willing to pay him for the fraudulent use of his name in the promotion of the said companies.

“(7) That the tremendous possibilities of profit from the leases in said General Lee Development Interests No. 1, staggered the imagination and appalled human comprehension, and that these tremendous profits, these royal riches would be paid just as surely as oil was found on these adjoining leases and that it would be a wonderful day for every man who had pinned his faith on General Robert A. Lee; Whereas in truth and in fact, as the said defendants then and there well knew, the representations as to tremendous possibilities or profit from the leases in General Lee Development Interest No. 1, staggering the imagination and appalling human comprehension was a highly exaggerated, inflammatory and fraudulent statement made only for the purpose of inciting and inducing the said persons to be defrauded to part with their money and property in the purchase of shares or beneficial interests therein.

“(8) That the said General Robert A. Lee Interests No. 1 was quickly oversubscribed; that Yankees and Rebels alike had swamped the said General Robert A. Lee with orders and purchased every interest in his leases within fifteen days; that for this reason he had organized General Lee

Interest No. 2 for those too late to get in on his No. 1 and was offering positively the only chances to get in on these lease interests; Whereas in truth and in fact, as the said defendants then and there well knew every interest in General Lee No. 1 had not been purchased within fifteen days nor at any time, but a large number of shares remained unsold and Interests No. 2 was organized only because the said defendants believed themselves able thereby to incite and induce the said persons to be defrauded, to purchase further shares and so to defraud the said persons out of their money and property.

“(9) That the letters written to the said General Robert A. Lee by his friends telling of the great confidence and of the faith they had in him had made his heart glad and had acted as an inspiration for him to attempt bigger things and had been the cause of his organizing the General Lee Development Interest; that in this third enterprise also he had made one decision first, namely, to place his name and the great honor of it behind the organization; Whereas in truth and in fact, as the said defendants then and there well knew that whatever letters were written to the defendants expressing confidence and faith in them or either of them was due to the false and fraudulent representations, herein set forth and only inspired the defendants to make further false and fraudulent statements and the said companies were organized for the sole purpose of obtaining money and property from the persons to be defrauded by false and fraudulent pretenses, representations and promises.

“(10) That the first selection of the said General Robert A. Lee for the said General Lee De-

velopment Interests was a spot in North Texas where he had discovered what he believed to be the apex of the most promising oil structure in all Texas, the goal for which oil men had been seeking for years; that this structure was so definite and pronounced that he had named it the Roanoke Uplift in honor of the little town of Roanoke, Texas; that he was planning to drill his first well on this remarkable structure and had contracted for 6,183 acres of land in that vicinity, which he considered the best prospective oil lands in Texas; Whereas in truth and in fact, as the said defendants then and there well knew, the said Robert A. Lee had not discovered the apex of the most promising oil structure in all Texas not any promising structure whatever; and the said structure was not definite and pronounced and was not of any reasonable oil prospects, but in fact was of a most unpromising wildcat character condemned by reputable geologists.

“(11) That the plans carried out by the said General Robert A. Lee stamped the enterprise of the General Lee Development Interests unquestionably as one of the most ambitious and at the same time certain of fulfillment that the oil world had ever known; that the said General Robert A. Lee was to drill ten wells for the said General Lee Development Interests and was giving an iron-clad pledge and guarantee to get production for his army of investors; that this was a plain and positive guarantee that before he completed the enormous task he had set out to accomplish oil would be running into the pipe lines for benefit and enrichment of his many followers; Whereas in truth and in fact, as the said defendants then and there well knew, the plans announced by the

said defendants in the name of Robert A. Lee were not the most certain of fulfillment that the oil world had ever known or certain at all, but were falsely devised with the intent and purpose of defrauding the public and the said pledge and guarantee that ten wells would be drilled and that production would be obtained and oil running into the pipe lines was made and advertised only for the purpose of more readily inciting and inducing the said persons to be defrauded to deliver to the said defendants their money and property.

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made, and planned to be made by said defendants were false and untrue, and at all the times mentioned herein were known by the defendants, and each of them, to be false and untrue, and to be made by the said defendants with the purpose and intent of inducing the said persons to be defrauded to pay to them, the said defendants, large sums of money for shares or certificates of interests of the said companies, and which said shares or certificates of interests were then and there of much less value than the persons to be defrauded were to pay for the same, all of which the said defendants then and there well knew.

And the Grand Jurors aforesaid, upon their oaths as aforesaid, do further present and find that the said defendants, so having as aforesaid devised the said scheme and artifice to defraud, in and for executing the same, and in attempting so to do, did unlawfully, wilfully, feloniously and knowingly on the 13th day of April, 1922, at Fort Worth in the County of Tarrant, State of Texas, in the Division and District aforesaid, and

within the jurisdiction of this Court place and cause to be placed in the Post Office of the United States at said Fort Worth, a certain letter enclosed in a postpaid envelope addressed to Miss Alice M. Kane, 14 Warren Street, Roxbury, Mass., which said letter is in substance as follows, to-wit:

"Robert A. Lee,  
Geologist.  
Suite 505 Burk Burnett Building,  
Fort Worth, Texas,  
4-13-22.

Miss Alice M. Kane,  
14 Warren Street,  
Roxbury 19, Mass.

Dear Miss Kane:

I wrote you a few days ago telling you that I was organizing General Lee Development Interests. I also told you some of the reasons. This is the third and probably the last opportunity my friends and followers will have to make further investments with me.

In my letter to you I sketched roughly my plans. I advised you not to make any further investments in oil securities until you had heard from me, and now I am going to tell you why I asked you to wait.

Before I tell you of my plans for the General Lee Development Interests you will doubtless want to know something regarding the General Lee Interests, in which you are interested with me.

Our leases in the northwest extension are looking better each day, due to the fact that almost daily new locations are being made and derricks going up. Many of these have had wonderful

showings of gas and oil at different depths, and the logs of each that I have seen check up almost identically with those of the biggest wells drilled in the Mexia field proper, and I think it will be just a matter of time before one of these wells will come in. When one does make a producer our leases will be worth many times their present value.

The only unfortunate part of the whole matter, which requires our patience, is that we are not drilling these wells ourselves. If I were supervising the drilling of them I am certain that I would be making much speedier headway. I am satisfied with the way they are being drilled and managed, however, and it is sometimes better for others to drill more slowly.

The best news that I received last week was about the Davidor well. At a depth of approximately 1140 feet this well was reported to be making six million cubic feet of gas. A gasser of this size at such a shallow depth will, of course, pay, but not in proportion to what a good oil well would, and I have been informed that they will continue drilling for oil. This well, of course, can be plugged back at any time but I predict that it will never be done because I think that when they reach the depth at which they will find the Woodbine sand they will bring in the biggest oil well that has ever been brought in, in Mexia.

All of this news I am sure is of as much interest to you as it is to me. It merely shows that up to date my predictions have all proven true, and I want you to always bear in mind all that I further say.

Remember, I have never located a well that did not prove a producer, and I have never selected a piece of acreage that did not prove productive.

It is needless for me to further recount to you the anxious and successful years that have combined to make a lifetime full to the brim of activity and accomplishment. It is needless for me to tell you of this. When I tell you face to face that my heart and soul thrill with the anticipation of the greatest achievement that is to come, you can readily picture yourself, the success that is in store for General Lee Development Interests.

The letters you have written me in the past telling me of the confidence and of the faith you have in me certainly make my heart glad. The words you have written me have acted as an inspiration for me to attain bigger things. I have hundreds and hundreds of letters before me now which mainly have been the cause of my organizing the General Lee Development Interests.

When I decided to form the General Lee Development Interests, as I did when I organized the General Lee Interests Nos. 1 and 2, I made one decision first. It was this—I would put my name and the great honor of it behind the organization. That was my first step. You know how much the name of Lee means to me. The name Lee stands for every thing that is true and honorable and courageous in life. It is a name, that has won distinguished honor in this nation. It is a name that says "Honor first."

When I gaze back on the pages of history and meditate on the achievements of the family of Lee, their deeds come up before my eyes in what

is really a pageant of achievement. I see Richard Henry Lee pleading for liberty alongside of Patrick Henry in the Virginian assembly; I see the famous "Light Horse Harry" Lee giving impetus to American Independence by his courage and bravery during the Revolutionary war; I see our own General Robert E. Lee at Gettysburg, staunch and unafraid; I see the accomplishments of countless hundreds of Lees adding luster to the brilliant events of our history.

I can see, as if it were just yesterday, when General Robert E. Lee leaving my father's farm in Tennessee, called me to him, placed his hands on my shoulders and said: "Bobby, keep the name of Lee always first in your mind. The name of Lee is a name of honor. It has never been dishonored and stands without a stain. Keep it so, Bobby. Be square and honest, for there is a reward for clean dealing that can not be purchased with wealth."

These words have ever rung in my ears. They have been etched into my heart and have been uppermost in my business dealings with my fellow man. To that principle I attribute more than to any other one thing the measure of success that I have attained in my profession.

And it's the spirit that I held fast to when I decided to give my name and my time, my purse and my honor, to General Lee Interests Nos. 1 and 2, and to the General Lee Development Interests, which I have just organized. You know that I am a man well along in years. You know that I do not crave the wealth of this world, rather would I have my name emblazoned upon the hearts of my fellowmen throughout this nation that are striving to get ahead in the world.

Money can mean but little to me. I have enough to permit me to live in comfort the rest of my days, but I will never rest, I will never quit my geological work in the oil fields of the great Southwest, until I have made it possible for my hundreds of associates, friends and followers to share in the most marvelous wealth in the world that comes from the successful drilling of true oil structures.

I come to you again with the clean hands of a man who has been trusted, and who has never broken faith with his followers, a man who is successful, a man who has made money for himself and fortunes for others. My thousands of friends, associates and followers insisted on my starting General Lee Development Interests and letting them join me. I am firmly convinced of the tremendous possibilities offered in the Mid-Continent fields where there are many undiscovered structures yet to be located and drilled.

Now as to my plans:

I will drill ten wells for oil.

This is not a meaningless array of words; it is a promise reverently given, and one that will be strictly and conscientiously and honorably adhered to.

The first well will start soon, and the others will come rapidly after it. There will not only be one chance for riches, but many of them. And more even than the elaborate and comprehensive drilling program I have mapped out. I am making the important declaration.

I positively guarantee to get production.

That's what I mean in just so many words. I will positively get production. Before I have com-

pleted my remarkable campaign of development, I give you my ironclad guarantee that oil will be running into the pipelines for the benefit and enrichment of my followers.

You know that I have never made a promise that I did not keep; I shall keep this one. The determination to succeed in this enterprise has gripped me and holds me steadfast to my task.

If I could take you out in the field with me, where I am most at home, I would take you to the finest oil structure in my opinion in the whole United States. It is a structure that I have named in honor of the little town of Roanoke, Texas, where I have lived for a long time, and where I know most everyone and everyone knows me.

This is a structure that would delight and please you, as it gladdened me. I believe that the Roanoke Uplift is the best chance for oil in Texas today. I shall do my level best to bring in on this marvelous, symmetrical oil structure the biggest gushers that North America has ever seen.

As it told you I would do in my last letter, I am writing you first. I am letting you know of the organization of General Lee Development Interests because you responded so freely and so readily upon receipt of my first invitation; because you are my partner in my other ventures.

When I tell you that I am going to drill ten wells, and when I tell you that I am positively going to get production for you, you also know that you can further bank upon my word. I have never broken faith with you, and you know that I never will.

I want you to take advantage of this offer at

once. If you can not make payment of all of the interests that you will want you may send me your check for as much as you can, and I will reserve more for you and you can pay for them at a later date. The point is that I want you interested in every oil venture that I go into and, as I said before, this will probably be my last, and there is no doubt that it will be the biggest and most stupendous drilling campaign ever carried on before in the Mid-Continental oil field by any individual or company whose capitalization is only \$250,000.

The enclosed application blank is for your convenience. Wired reservations will be held until your letter has had time to reach me. I will await an answer from you.

Faithfully yours,

RAL-H.

(ROBERT A. LEE).

P. S.—Remember these interests are only \$1.00 each. You may take all that you can conveniently carry."

and which said letter was to be sent and delivered by the postoffice establishment of the United States to the addressee thereof, and at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter and circular was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

## SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said de-

fendants, on May 19th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, and allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter, addressed to one Alice M. Kane, 14 Warren Street, Roxbury 19, Mass., of the tenor following, to-wit:

“General Robert A. Lee  
Geologist

Edwards Building  
Fort Worth, Texas, May 19, 1922.

Miss Alice M. Kane,  
4 Warren St.,  
Roxbury 19, Mass.

Dear Miss Kane:

A few days ago I received your telegram reserving 300 additional interests. I did not answer this wire. I was awaiting your check and letter.

Today I received your check for \$100.00 as part payment on these interests with the notation that you will pay the balance some time in June, which is, I assure you, satisfactory. This will make in all 500 interests that you will have.

I certainly enjoyed reading your letter, and am glad to know that you feel that you could

confide in me. Do not hesitate to write just the way you feel. Anything you tell me, I assure you, will be treated as strictly confidential.

Apparently you are not very well versed in the oil business, and just anything that you want to know, I assure you, will be explained to you in detail.

The spudding in of a well means the commencing of actual drilling. Many leases in the oil fields are secured on drilling contracts. As an example, when we get a well in Roanoke on our 6000-acre tract we will not care to drill all of the balance of this and ourselves, but will want some of the larger companies to drill part of it for us. We will let many so-called drilling contracts, and in each case we will give them a specified time in which they have to start actual drilling.

As an example—say we give one of the companies a drilling contract to drill on a 50-50 basis—this is, they take 50% of the oil, and give us 50% of the oil, they to pay the actual cost of drilling on a 40-acre tract. Now, in our contract we will specify that they will have to start actual drilling within a period of thirty days from that date. Sometimes it will be impossible for them to get their derrick erected in time for the commencing of this drilling. In a case of this kind, rather than lose their contract they will move a small rig out to the lease, which we call a spudding machine, and spud in so that they will not have to forfeit their contract. In other words, it means as I told you above, merely the commencing of actual drilling.

Now, Miss Kane, you will probably want more than 500 interests before they have all been sold.

You will not necessarily have to pay all of this amount in June, and if you would care to have 1,000 of them I would be pleased to hold them for you, and you may make payments in July and in August, and regardless of what price they may be selling for at those dates, yours will be issued to you at their present par value.

With my very kind regards, I am

Faithfully yours,

RAL:EL.

(Robert A. Lee)"

That at the time of placing and causing to be placed the said letter in the postoffice at the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

### THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said defendants on May 25th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this Court as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there to be sent and delivered by the postoffice establishment

of the United States to another of said persons to be defrauded, that is to say, a letter, self addressed envelope to the defendant Robert A. Lee, application blank for interests in General Lee Development Interests and also a certain booklet or folder concerning "The Honor of the Lees" addressed to one A. L. Askanas, 704 Pantages Bldg., Los Angeles, Calif., of the tenor following, to-wit:

"General Robert A. Lee  
Geologist

Edwards Building

Fort Worth, Texas, May 25th, 1922.

Mr. A. L. Askanas,  
704 Pantages Bldg.,  
Los Angeles, Calif.

Dear Mr. Askanas:

At the request of many of my friends, I had a little booklet—"The Honor of the Lees"—printed a few weeks ago. I only had a very few of these made at that time and sent them to those of my friends who wanted one. It seems that every one of my friends to whom I sent this booklet must have told their friends, nearly everyone in the country who has not received one has written me asking me to send one to them.

Now, I don't remember whether I sent you one or not, but anyway I want you to have one before they are all gone again, so to make sure I herewith enclose you one.

I want you to read every word I have written—I am sure you will—those lines never grow old to me—I never tire of recalling the great and valorous deeds of the Lees, and I am sure you are equally proud of the part they have played

in the founding of this great and glorious nation of ours. Let your children read and study it. Let the name of Lee be an inspiration to them to attain the higher ideals, and may it be one means of making better men and women of them, patriotic and loyal citizens, such as every Lee mentioned in its pages.

I am going right along now with my development plans. My derrick is now almost completed. I am letting a contract for the drilling, and actual operations will be commenced now without delay.

Our first well is to be drilled right in the center of our immense 6,000-acre tract, which gives us absolute control of this entire field.

Operators now realize the value of this tract to the extent that already I am receiving numerous bids for many of them to drill small tracts on a 50-50 basis. In fact, one of my followers states that he will be down next week to make me an offer to drill part of this lease.

Just as soon as this well is under way, I will arrange to start our second and third wells in some of the other mid-continental fields. As I have told you before, nine other wells are to follow rapidly until I have finished this stupendous campaign, and I positively guarantee production.

I have sold more than half of this present issue now, and if you have decided how many more of these interests you will want, I want you to write me at once so that I can take care of you. Regardless of how many of these interests I am now holding for you, and whether or not you are in a position to pay for them now, I want you

to reserve all that you will ever want, because otherwise I will not be able to protect you.

I am enclosing you another application blank, and want you to attend to this matter today.

I am going to keep you advised at all times as to our development, and ask you to write me from time to time and ask me anything you want to know, because I am always glad to hear from you.

With my kindest regards, I am

Faithfully yours,

RAL-M

ROBERT A. LEE.

P. S. Please notify me by return mail when you receive this booklet."

said envelope having the following printed thereon:

"General Robert A. Lee,  
Edwards Building,  
Fort Worth, Texas."

said application blank being in words and figures as follows:

"Application Blank

General Lee Development Interests

Edwards Building, Fort Worth, Texas.

Date.....

General Robert A. Lee.

Dear Sir:

I desire to become a member of your General Lee Development Interests and enclose herewith the sum of \$.....in full payment for.....interests.

It is my understanding that these interests are fully paid and non-assessable, and that I am to share pro rata and in proportion of my investment,

in all profits which may accrue from the sale of oil or gas, or any properties now owned or which may be hereafter acquired by these interests.

\$ 10.00 buys 10 interests  
 50.00 buys 50 interests  
 100.00 buys 100 interests  
 300.00 buys 300 interests  
 500.00 buys 500 interests  
 1,000.00 buys 1,000 interests

Name .....

Street or P. O. Box.....

City..... State....."

said booklet or folder concerning the honor of the Lees being an illustrated and biographical sketch of the historic Lee family, that at the time of the placing and causing to be placed the said letter together with the said enclosures in the post-office of the United States as aforesaid, the defendants then and there well knew that said letter and enclosures was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

#### FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that said defendants, on June 20th, 1922, at Fort Worth, aforesaid, in said division and district, so having devised the scheme and artifice for obtaining money and property under false and fraudulent pretenses, representations and promises, described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count as fully as if they were here

repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully, knowing and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States, there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Alice M. Kane, 14 Warren St., Roxbury, 19, Mass., of the tenor following, to-wit:

"General Robert A. Lee,  
Geologist

Edwards Building

Fort Worth, Texas, June 20, 1922.

Miss Alice M. Kane,  
14 Warren St.,  
Roxbury, 19, Mass.

Dear Miss Kane:

I am sending you under separate cover a booklet I had printed for you and other of my friends. The booklet tells the story of the Declaration of Independence. This great document of human liberty should be in every home in America, and in my opinion it ranks second in importance to but one other, the most sacred, The Holy Bible.

The Declaration of Independence, though simply written, tells the story of political freedom, civic liberty that has endured and will endure for hundreds of years, written as it was by men thoroughly American in ideals, hopes and aspirations.

Can you blame me for the thrills that stir my heart when I look back and read of my own forebears, Richard Henry Lee and Fitzhugh Lee, who took the first steps in the early Colonial struggle for freedom? My heart warms with the inspiration

of it, and I know that every other good American feels the same.

We find in the second paragraph—"That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness"—'and the pursuit of happiness.'

Man can not have happiness without conscience, no matter how much wealth he may possess, but with a clear conscience and sufficient money with which to purchase his worldly needs, there is no reason why every one can not enjoy happiness.

A man is as good as his word.

I am going to take this opportunity to tell you what progress I have made in the short time of only a few weeks.

We will progress much more rapidly now, however, because although the details are seemingly small for the commencing of a drilling campaign, the actual starting is of the most importance. A little time spent now in getting everything in proper shape for the drilling of wells will save days and even months sometimes during the progress of actual drilling.

The derrick, as you know, is now completed, and when you receive this letter the rig should have been on the ground for the drilling of our first well on the 6000-acre tract at Roanoke.

A man's word should be his bond.

I promised the good people of Roanoke I would be drilling this well by the 27th day of June, and although I hope to be well under way by that time, every one knows that when I make a declaration I

adhere to it, and they all know that this well will be drilling by the 27th of this month.

As soon as this well is drilling my plans are to start Well No. 2, and when it is drilling to commence the drilling of No. 3, and so on until I have completed the drilling of ten wells, and have production in the pipe lines—production that I positively guarantee to get.

Two Lees, as you will see in the booklet I sent you, were signers of the Declaration of Independence, our political independence that was obtained on July 4th, 1776. Financial independence is what I am striving to get for you, and by July 4th, 1922, we will be on our way toward this financial independence, riches, wealth and 'the pursuit of happiness.'

Now, Miss Kine, every one appreciates the merit of this proposition the same as you, and every one who knows about it is straining a point to purchase every interest he can possibly carry while these interests are still on the market at their present par value.

You know just as well as I do that the big money made in oil securities is made by buying interests at par, coming in on the ground floor the same as you did, and regardless of how many interests you now have reserved, I want you to write me today and let me hold just as many more for you as you think you can possibly carry.

I hope you will enjoy reading the booklet I sent you. I will appreciate hearing from you.

I hope you will enjoy reading the booklet I sent you. I will appreciate hearing from you.

Sincerely yours,

ROBERT A. LEE.

RAL:EL

P. S. I will try and answer your letters the same day I receive them as I have in the past, but a great deal of my time will be spent in the fields and your answers may be delayed for a day or two."

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

#### FIFTH COUNT.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that said defendants on July 24th, 1922, at Fort Worth aforesaid, in said division and district, so having devised the scheme and artifice and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated, by reference thereto, in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice, unlawfully, wilfully knowingly and feloniously did place and cause to be placed a certain other letter in the postoffice of the United States there, to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter addressed to one Mrs. Violet R. Bowen, 1306 Wood St., Dallas, Texas, of the tenor following, to-wit:

'General Robert A. Lee.  
Geologist.

Edwards Building

Fort Worth, Texas, July 24, 1922.

Mrs. Violet R. Bowen,  
1306 Wood St.,  
Dallas, Texas.

Dear Mrs. Bowen:

My final summons—my last call to you.

I have written you several times and have sent you circulars upon two different occasions trying to impress upon you the fact that General Lee Development Interests is the real oil deal of the hour, telling you the real importance of your making an investment in this wonderful proposition, no matter how small this investment might be.

It was with no little thought that I took upon myself this greatest of undertakings—the responsibility—that of the organization of the General Lee Development Interests when I promised you and every one of my friends and following that I would drill ten wells and positively guarantee without quim or quibble to get production.

After I had finished my plans and had outlined the procedure that I would undertake, I sat down and immediately wrote you and told you about it. I wanted to let you and all of my partners who were interested with me in the organization of General Lee Interests know of this before I gave the general public an opportunity to procure any of these interests.

\$250,000.00 is a small amount of money with which to drill ten oil wells, more especially so when the first one I am drilling will in all probability cost

\$50,000. But \$250,000.00, the amount of the capital of General Lee Development Interests is a lot of money when one is raising it solely through the mails, soliciting only checks in amounts from \$10.00 to \$100.00 each. Stop and consider one minute. Were I to take in \$1000.00 every working day, it would require better than 42 weeks to sell these interests,—almost a whole year.'

and such letter ending as follows:

'On June 27th I spudded in Well No. 1, on the immense 6000-acre tract at Roanoke and have already reached a depth of nearly 500 feet, and before many more weeks we should have one of the greatest producing wells ever brought in on this continent.

A \$10. bill ,a \$20. bill, or even \$100 is not going to break you. In fact, this amount of money will not even help to make me. But this small amount of money invested in General Lee Development Interests may be the means of affording some of the luxuries that this life affords and of which you and yours are entitled. It is not selfishness on my part. As a matter of fact, if I thought you were sending me one single dime under protest, if I thought that you bought one single interest and were not doing so of your own free will and accord, I would not think of accepting it for one minute and would return the money to you the day it was received.

Remember, these interests have only been on the market but a very few weeks and I have but a few remaining to sell. The time is now short in which you can come into this proposition at par and it now requires quick action on your part.

Don't delay another minute. This is positively the last chance you will ever have at buying General

Lee Development Interests unless you are willing to pay from five to ten for one for them.

Send in your remittance today, if even but for ten interests.

With my very kindest regards, I am,

Faithfull yours,

ROBERT A. LEE.'

RAL:LF

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme and artifice; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

#### SIXTH COUNT.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Robert A. Lee, Charles A. Scherwin, Harry H. Schwarz, William Schloss, Philip Goldstein, otherwise called Ralph P. Gibson, Robert Ball Jr., Nathan H. Sang, otherwise called N. J. Lang, Max Hirsch, otherwise called M. Haas, and Walter Marks, defendants, continuously throughout the period of time from January 1st, 1922, to the date of the filing of the indictment at Fort Worth, in the County of Tarrant, State of Texas, in the division and district aforesaid, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to committe divers offenses against the United States Court, the divers offenses charged against said defendants in the divers counts of this indictment pre-

ceding this count, and made offenses by section 215 of the Penal Laws of the United States; and that said defendants did thereafter do divers acts to effect the object of said unlawful and felonious conspiracy, to-wit, not only the several acts of placing letters, circular letters, advertisements and publications in the postoffice of the United States at Fort Worth aforesaid, described in said several preceding counts, but numerous acts of preparing said letters, circular letters, advertisements and publications for mailing, and the newspaper and magazine advertisements and publications in said first count mentioned for publication and of making the false and fraudulent pretenses, representations and promises in the first count of this indictment described and obtaining by means thereof the money and property of persons belonging to the class of persons in said first count mentioned, as well as certain other overt acts now here specified; that is to say:

#### Overt Acts:

(1) The said defendants on March 11th, 1922, at Fort Worth, aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to Miss Alice M. Kane, 14 Warren St., Roxbury, Mass., which said telegram was of the following tenor and effect, to-wit:

(1) 'Fort Worth, Texas, Mar. 11, 1922.

Miss Alice M. Kane,

14 Warren St., Roxbury, Mass.

Askew and Kirby wells look like certain producers our lease almost sure to be worth many thousands per acre when these wells come roaring in have only

thirty eight interests left to sell will again be over-subscriber am reserving you five more interests until I hear from you you may take all or any part of them am keeping faith with you giving you every chance to share a big fortune with me you must decide at once advise.

GENERAL ROBERT A. LEE.'

(2) The said defendants on May 6th, 1922, wrote and caused to be written a certain letter at Fort Worth, Texas, in said division and district and addressed to Mr. C. F. Throm, 383 Nebraska Avenue, Toledo, Ohio, and enclosed said letter in a post-paid envelope and deposited and cause dto be deposited in the postoffice of the United States at Fort Worth aforesaid, and which said letter is in the following tenor and effect, to-wit:

'Mr. C. F. Throm,  
383 Nebraska Ave.,  
Toledo, Ohio.

Dear Mr. Throm: There is nothing that I would like better than to be able to call on you and have a nice, long talk and tell you of the developments of General Lee I nterests No. 1 and General Lee Interests No. 2.

I would like to tell you about the Davidor well, which came in making ten million cubic feet of gas per day, and of the scores of other wells drilling near our leases, which make our holdings look so good.

I would like to tell you of my General Lee Development Interests, my latest and in all probability my last venture of this kind, for which I am going to drill ten wells and for which I am guaranteeing to get production.

To get away for a few days would mean that I would have to neglect my work here, and that would mean the retarding of our progress, so a personal visit is out of the question.

I want you to know all of the above and more, so I am sending my personal representative from Fort Worth. Ask him any questions that you want to know, I assure you it will be a pleasure for him to answer them for you. Any courtesies shown him will be greatly appreciated by me.

With very kind regards, I am,

Faithfully yours,

ROBERT A. LEE.'

RAL:H.

(3) That the said defendants on June 3rd, 1922, at Fort Worth aforesaid, in said division and district deposited and caused to be deposited with the Western Union Telegraph Company a certain telegram to be transmitted by said Western Union Telegraph Company by means of its telegraph wires to C. F. Thom, 383 Nebraska Ave., Toledo, O., which said telegram was of the following tenor and effect:

'Ft. Worth, Tex., 1922 Jun. 3 P M 2 17

C. F. Thom,

383 Nebraska Ave., Toledo, Ohio.

My personal representative Mr. N. J. Lang will call on you Monday with good news for you.

GENERAL ROBERT A. LEE.'

(4) That the said defendants on June 20th, 1922, at Fort Worth aforesaid, in said division and district, wrote and caused to be written a certain circular letter, and on said date caused the said circular letter together with a printed circular to be enclosed together in an envelope to be deposited in

the postoffice of the United States, at Fort Worth aforesaid, said circular letter being on the letter head of General Lee Development Interests, said letter commencing 'From General Robert A. Lee, Fort Worth, Texas,' and concluding 'Faithfully, Robert A. Lee.'

(5) The said defendants on July 11th, 1922, at Fort Worth aforesaid, in the said division and district, wrote and caused to be written a certain letter, and on said date aforesaid caused the said letter to be deposited in the postoffice of the United States at Fort Worth aforesaid, which said letter was in the following tenor and effect:

'July 11, 1922.

Mr. C. F. Throm,  
401 Hunt St.,  
Toledo, Ohio.

Dear Mr. Throm:

In answer to your good letter of the 3rd, I wish to state that I am sending my representative, Mr. Marks, to call on you, and I am sure that he will explain everything to your entire satisfaction.

If I were not so busy with the drilling of the well on the 6000-acre tract at Roanoke, I would like to make this trip myself, but hope you will appreciate that it is impossible for me to do this now.

With kindest regards, I am,

Faithfully yours,

ROBERT A. LEE.'

RAL:LF

(6) That in pursuance of said letters and telegram to C. F. Throm hereinabove mentioned the said defendants, Max Hirsch, otherwise called M. Haas and Philip Goldstein, called on the said C. F. Throm as representatives of the said General Rob-

ert A. Lee and the General Lee Development Interests and induced and persuaded the said C. F. Throm by making to him glowing and glittering promises as to the condition and possibilities of said company, to turn over to them large sums of money and property in payment for shares and certificates of interests in said company.

(7) That in pursuance of said letters and telegram hereinbefore mentioned the defendant, Nathan H. Sang, otherwise called N. J. Lang, called on C. F. Throm and induced and persuaded the said Throm to make further and larger investments in said company.

(8) That in pursuance to said letters and telegram hereinbefore mentioned the defendant Walter Marks called on the said C. F. Throm and by further statements and representations to the said Throm induced him to make further and larger purchases of said shares or certificates of interest in said company.

(9) That in pursuance to certain letters written by the defendants to Mrs. Emma O. Lewis, Lexington, Ky., the said Mrs. Lewis was advised that a personal representative of the said Robert A. Lee and General Lee Development Interests would call upon her and in pursuance thereof the said defendant William Schloss called on the said Mrs. Emma O. Lewis and showed her a letter of introduction from the said General Robert A. Lee; that the said Schloss represented that the company was in a very flourishing condition and would pay a 20 per cent dividend the first of September and five per cent per month thereafter, thereby including and persuading the said Mrs. Emma O. Lewis to make other and further investments in said company.

(10) That on September 29th, 1922, said defendant Robert Ball, Jr., called on the said Mrs. Emma O. Lewis and presented to her a letter of introduction from the said General Robert A. Lee, the said Robert Ball Jr., representing that he was a son-in-law of Colonel Humphries, an oil operator of Texas, and by making other and further statements concerning the prospects and possibilities of said General Lee Development Company the said Mrs. Emma O. Lewis was induced and persuaded to make other and further investments in said company.

(11) That in pursuance of said scheme the said defendant Ralph P. Gibson, called on the said Mrs. Emma O. Lewis and made other and further representations to her and induced and persuaded the said Mrs. Emma O. Lewis to turn over to said defendant Gibson large numbers of securities and property of the value of several thousand dollars, in exchange for shares or certificates of interest in said company.

(12) That the said Ralph P. Gibson called on Miss Alice M. Kane, Roxbury, Mass., and induced and persuaded her to turn over a large amount of securities of the value of several hundred dollars, in exchange for shares or certificates of interests in said company.

(13) That in pursuance of said scheme said defendants Max Hirsch, otherwise called M. Haas, and Ralph P. Gibson called on the Rev. William J. Vincent, New Orleans, La., and presented to the said Vincent a letter of introduction signed by General Robert A. Lee, and said defendants made representations and promises to said Vincent and induced and persuaded the said Vincent to make investments in said General Lee Development Interests.

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

D. B. BURROUGHS,

Foreman of the Grand Jury.

HENRY ZWEIFEL,

United States Attorney.

H. L. ARTERBERRY,

Special Assistant U. S. Attorney.

S. R. RUSH,

Special Asst. to Attorney General."

The petitioners, with permission of the court, presented a plea in abatement and a plea of immunity, which was in writing, and as follows:

"Now comes the defendants Charles Sherwin and Harry H. Schwarz, and after having entered their plea of not guilty herein, and after their plea of immunity heretofore filed on the.....day of May, A. D. 1923, was by the court overruled, and with special permission of the court to so 'plead over' and present the same and the evidence thereon to the jury for a hearing and determination, present this their amended and amplified plea of immunity in bar of any prosecution by virtue of the indictment heretofore returned against them jointly on the.....day of April, 1923, wherein they are charged with the offense of violating Article 215 of the Criminal Code of the United States for the alleged offense of having placed letters, etc., in the United States mails for the purpose of executing a scheme and artifice to defraud as previously alleged, and for such plea would respectfully show the court:

"That they were connected as officers with certain oil companies known as General Lee Interests No. 1, General Lee Interests No. 2 and General Lee Development Interests, which were each common law

trusts, and that they were so connected with said companies as such officers prior to the convening of the grand jury which returned the indictment against them herein, and that prior to the convening of said grand jury as aforesaid, and prior to the filing against these defendants any complaint or charge, that one John F. Southworth, who at said time was either a member of the Federal Trade Commission, or one of its duly authorized agents, either or both, came to the offices of these defendants and demanded evidence concerning said oil companies above named, and of the participation by these defendants of the promotion of said companies; also demanded that each of these defendants answer his lawful inquiries with reference to said companies and these defendants connection therewith; and that these defendants had previously thereto refused to give any testimony with reference thereto to the said Southworth and to said Federal Trade Commission; and that upon the said Southworth's coming in person to the offices of these defendants as aforesaid, he demanded of these defendants that they produce all their documentary evidence showing how and in what manner said companies were organized and operated and demanded and required of these defendants by virtue of lawful authority vested in him, to answer certain questions then and there by said officer demanded of these defendants under the pains and penalties of violating the law and subjecting themselves to imprisonment and fine in case they refused to give said evidence and to produce said documentary proof and documents as hereinabove mentioned.

"That the first demand of the Federal Trade Commission was in the form of a letter, which said letter contained copy of a part of the law relating to the

giving of evidence before the Federal Trade Commission, and containing the penalty of non-compliance therewith, but did not contain any portion of the law relating to immunity, commanding that these defendants answer certain questions and furnish certain testimony in response thereto, and these defendants thereupon consulted their attorney, namely, R. F. Turner, Esq., and said attorney advised them that they did not have to furnish such information or give such testimony as was being demanded by the Federal Trade Commission, and relying upon said attorney's advice and his knowledge of the law, they then and thereafter refused to comply with such demand, or to in any manner furnish testimony of any character concerning their business, or letters and documents connected therewith. That thereafter the said John F. Southworth, authorized agent and examiner of the Federal Trade Commission appeared in person at their office and again demanded of these defendants that they produce their books, documents, contracts and letters of and concerning the affairs, conditions, operations, control and management of said oil companies herein mentioned, and these defendants again declined to furnish said information, or to give said testimony, stating to the said Southworth that their attorney had advised them not to do so; that thereupon the said Southworth requested the name and address of their said attorney, which was furnished to the said Southworth, and as these defendants believe, and so believing allege it to be a fact that the said Southworth left their offices and consulted with the said attorney for the purpose of convincing said attorney that it was the duty of these defendants to answer all questions and furnish all testimony demanded by the said Southworth, and that their failure so to do would make them liable to the punishment pre-

scribed in Article 8836-J; that the said Southworth did confer with the said Turner, and produced and read to the said Turner all of the law contained in Article 8836-A to 8836-K inclusive, and the said Southworth advised the said Turner that these defendants by the terms of said law were forced and compelled to give such testimony and that a failure to do so would make them subject to the punishment prescribed therein, and further advised the said Turner that the giving of such testimony on the part of Sherwin and Schwartz would not in any manner hurt or effect them in criminal prosecution, for that under the terms of said law the said Schwarz and Sherwin would not thereafter be subject to prosecution for any offense concerning which they were giving and were commanded to give such testimony, and that the terms of the law applicable to the Federal Trade Commission included common law trusts as well as corporations. That the said Turner, as attorney for these defendants, thereupon advised the said Sherwin and Schwarz that their oil companies came within the purview of said Articles 8836-I and 8836-J, and that their giving such testimony to the said Southworth would not hurt them, and that unless they did comply with the demands of the said Southworth they would be subject to fine and imprisonment, or both by virtue of their failure to do so, and then and there advised these defendants to furnish said testimony, documents and letters, and to answer such questions as were demanded by the said Federal Trade Commission through the said Southworth.

"That in obedience to the lawful demand of the said Federal Trade Commission, acting by and through the said John F. Southworth, either as a member thereof, or as an authorized agent thereof,

these defendants produced, exhibited and delivered to said officer said documentary evidence showing how and in what manner said oil companies were organized, and showing the connection of these defendants therewith, and of other persons therewith, and of the character and kind of business then being done, and the nature of said business and in fact all of the documents and records of said oil companies then in the possession of these defendants, and, in addition thereto, did orally testify before said officer and answer all of the questions then and there by him propounded, and fully complied in every way with the demands of said Federal Trade Commission acting by and through said office under the benefits, pains and penalties of the law.

"That thereafter, the grand jury of the Northern District of Texas, at Fort Worth, Texas, convened and the evidence given by these defendants to the said Federal Trade Commission was delivered over and produced before said Grand Jury which heard and considered the same in the investigation of the case then pending against these defendants, and upon said evidence, or at least a major part of it, the said Grand Jury found the bill of indictment against these defendants in this case.

"That because of the facts as hereinabove set out under authority of Article 8836-I of the United States Compiled Statutes of 1918, and Article 8836-J of said statutes, by virtue of these defendants having been required as hereinabove set out, to give testimony against themselves, and to introduce all of their documentary evidence showing their connection with the oil companies as above set out, all of which was used as evidence against them, and which was used for the purpose of criminating them, and each of them, these defendants each plead

their immunity to prosecution in this case, because of their having been required as aforesaid, to furnish to the said Federal Trade Commissioner their evidence both oral and documentary, as above mentioned, all of which is too numerous and voluminous to set out in this motion, but which these defendants each aver was required of them under such circumstances as that under the law they cannot be prosecuted about any transaction or matter or thing concerning which they each testified and produced as evidence, documentary or otherwise, before the Commission or agent thereof, as hereinabove set out.

"Wherefore, defendants and each of them pray that the issue of their immunity and evidence thereon be submitted to the jury for determination and that said plea be in all things sustained, and that they be dismissed further prosecution herein without further answer.

Charles Sherwin,  
H. H. Schwarz."

The government filed a replication to this plea of immunity, which was as follows:

"Now comes the United States of America, by Henry Zweifel, United States Attorney for the Northern District of Texas, and for replication to the amended and amplified plea of immunity of the defendants Charles Sherwin and Harry H. Schwarz in the above entitled cause, respectfully alleges as follows:

"1. That neither of said defendants, either by compulsion under subpoena, or under oath, gave testimony or produced documentary evidence concerning any matters or things set forth in the indictment herein or in said plea alleged, and he therefore denies that said defendants, or either of them, obtained or are entitled to immunity from prosecu-

tion herein by reason of the production of any documents to or upon the demand of the Federal Trade Commission or any representatives as set forth in said plea, and he further denies that the said defendants, or either of them, were ever subpoenaed to testify or ever testified under oath, for or upon the demand of the Federal Trade Commission,, or any other branch of the Government in connection with any matters or things or concerning any company or trust estate or concerning their own relations to any of the matters or things which are or may be involved in the charges laid against said defendant in the indictment herein.

"2. That the prosecution herein relates exclusively to an alleged violation of Section 215 of the Criminal Code of the United States and of Section 37 of the Criminal Code of the United States, and relates in nowise to any violation of the Federal Trade Commission Act, or to any other law of the United States except as above set forth.

"3. That neither of said defendants were at any time ever called before the grand jury which returned this indictment against said defendants, nor before any grand jury considering any violations of what is known as the Mail Fraud Statutes, nor did either of them at any time testify or produce documents before any such grand jury on that subject, except that the defendant Harry B. Schwarz voluntarily appeared and requested to go before said grand jury and to testify in his own behalf, and thereupon signed a waiver of immunity, which is in words and figures as follows, to-wit:

"Fort Worth, Texas,  
March 31, 1923.

"I, H. H. Schwarz of Fort Worth, Texas, do hereby voluntarily request the United States Grand Jury,

sitting at Fort Worth, Texas, to permit me to appear before them in the matter now under consideration concerning Robert A. Lee, Charles Sherwin, H. H. Schwarz and associates, and concerning the General Lee Oil Interests, and request the foreman to administer the oath of a witness to me, acknowledging herein that I have been duly warned by H. L. Arterberry, Special Assistant United States Attorney of the United States of America, that I do not have to make a statement at all but that any statement I do make must be free and voluntary statement and that whatever statement I may make can be used against me in any proceeding in which I may become a party in any Court of the United States and cannot be used for me or in my behalf.

"I again state that this is a free and voluntary statement and that it is at my own instance and request that I am now before the United States Grand Jury at Fort Worth, Texas, for the purpose of making a statement concerning the matters aforesaid which the said grand jury is now considering.

H. H. Schwarz."

"4. In behalf of the United States the United States Attorney denies that J. F. Southworth, the authorized agent and examiner of the Federal Trade Commission, advised R. F. Turner, Esq., attorney for said defendants, that the failure of the defendants to answer questions propounded by him, and to furnish testimony demanded by him, said Southworth, and to furnish documentary evidence at his request and demand would subject the said defendants to the punishment prescribed by the said Federal Trade Commission Act, and denies that the said Southworth advised the said Turner that the giving of such testimony and the answering of said questions and the furnishing of said documents would

secure for the said defendants immunity from any criminal prosecutions, as alleged in said Amended and Amplified plea.

"5. Said United States Attorney further says that the allege evidence and information, both documentary and otherwise, alleged to have been given to the said J. F. Southworth, as a representative of the Federal Trade Commission, if any such evidence was given, was entirely independent and apart from the evidence upon which said defendants were indicted herein; that none of the alleged information or evidence documentary or otherwise, alleged to have been given and furnished to the said defendants or either of them, was presented to the grand jury, or was in anywise used against said defendants in the representation of this cause before the grand jury, or in the securing of said indictment; that none of said information or evidence, documentary or otherwise was in the possession of the Government Attorneys or agents of the Government or postoffice inspectors connected with the present proceedings, nor did any of said persons have any knowledge of the said alleged proceedings before the Federal Trade Commission or its representatives until the filing of the defendant's original plea of immunity herein, nor has any of said alleged information and evidence, documentary or otherwise, been used against said defendants in this or any other proceeding.

"6. The said United States Attorney further says that, at the time of the alleged giving and furnishing of the information and evidence, documentary or otherwise by the said defendants, it is nowhere shown in said plea or in the record or in any other manner that the defendants or either of them at any time, refused to furnish said information or evi-

dence on the ground that it might tend to incriminate him, or that said defendants, or either of them at any time prior to the filing of their original plea of immunity, made any claim of immunity in connection with the matters aforesaid, or any of them.

"Wherefore plaintiff prays judgment of the Court.

Henry Zweifel,

United States Attorney for the Northern  
District of Texas."

Upon said plea and the replication, the following hearing was had before the Court:

Charles Sherwin, one of the petitioners, testified before the court as follows:

"I am one of the defendants in this case. I am and was connected with the common law trust companies known as General Lee No. 1, General Lee No. 2, and General Lee Development Interests. Robert A. Lee, H. H. Schwarz and myself organized these three concerns, and I have been a trustee in these three companies since their organization up to the present time.

"I received a written communication from the Federal Trade Commission at Washington, D. C. I have not been able to locate all of these communications at this time. The document you hand me dated June 30, 1923, I received from and through the United States mail and I read the same. (The defendant then offered in evidence letter dated June 30, 1923, and marked Exhibit 1, which was admitted by the court, and is as follows: 'Washington, June 30, 1923. General Lee Development Interests, Edwards Building, Fort Worth, Texas. Sirs: This commission officially requests under Sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information

called for by the annexed schedule. As to any portion thereof which you cannot answer immediately please supplement your first statement with seven days upon the receipt of this letter. The Commission will consider this application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this commission's lawful inquiry.'

"This commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing the information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary.'

"I received the two writings that you now hand me, and I read them over, both of them (referring to Exhibits 2 and 3) I did not make any reply to the letters or either of them at the time I received them. Later on I met a gentleman by the name of Mr. Southworth; he called on me at our office—that is, the office of the General Lee Development Interests. Mr. Schwarz and myself were present and we had a conversation with Southworth. He reported himself to be an agent of the Federal Trade Commission. He sent a card in with his name on it—John F. Southworth, Federal Trade Commission. At that time he did not show us any other evidence

of what he represented, but later on we saw that he carried a portfolio with letter heads and other documents with the Federal Trade Commission form, and from the time we first met him up until the present time, I believed and still believe him to be the official of the Federal Trade Commission. When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaires sent us from Washington. I told him we did not come under the jurisdiction of the Federal Trade Commission, because we were not a corporation. Southworth then said we did come under the jurisdiction of the Federal Trade Commission, and that by not answering the questionnaires sent to us we were committing a crime subject to a penalty of imprisonment and fine, either or both. I told him I had consulted my attorney Mr. Turner at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we fill out or file any questionnaire sent to me by the Federal Trade Commission. Mr. Southworth then asked for the address of my attorney, and I gave it to him. He again told me we were committing a crime, and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. Southworth had an appointment with Mr. Turner and they met in our office and read the law to Mr. Turner, Mr. Schwarz and myself after which Mr. Turner then advised me that in accordance with that law, we were committing a crime by not answering the question. Question:

"Now then, what did you do?

Answer:

"We gave him everything that he demanded. The declaration of trust, copies of contracts, copies of leases, showed him record of our books gave him a list of the stockholders and some correspondence we had on some of them. We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him; in fact we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all the time, and acted together in furnishing Southworth this information.

"This gentlemen (Mr. Southworth) came to our office a half a dozen times before we gave him any information. After we began furnishing him with documentary evidence and information, he came to our office about twenty times.

"When he left our office and this city, he left with these documents in his possession. After Southworth left the city, we received communications from him by telegram. The four documents you now hand me, are the two telegrams received from Southworth by us and my two replies thereto, and they are marked exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence, and are as follows:

"No. 4. 'October 27, Eldorado, Arkansas, Charles

Sherwin care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, are not received. Southworth.'

"No. 5. 'Fort Worth, Texas, October 27, 1922. John F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz.'

"No. 6. 'November 8th, Kansas City, Missouri. General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth.'

"No. 7. 'November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin.'

"At the time that the first telegram was received I was not in Fort Worth, but upon my return, Schwarz and I had a letter from the Federal Trade Commission by John F. Southworth, examiner, asking for these names to which the telegram referred. In obedience to the letter and telegram we wrote a list of the principal stockholders of the General Lee Interests, being names and addresses of these stockholders demanded at that time, and sent them to John F. Southworth, Kansas City, as requested. We furnished the names and addresses of these stockholders to Southworth. After that we received another communication from Southworth asking for another copy of our declaration of trust, which Mr. Southworth claimed he had misplaced. We made and mailed same to him at Washington.

"Before we surrendered any information, documents or evidence to Mr. Southworth, there were discussions in our presence between him and our attorney about the law applying to our common law trust, and Mr. Southworth brought a book with him in which it elaborated as to whether or not a common law trust came under the jurisdiction of the Federal Trade Commission, and the fact that it was only supposed to cover corporations—that is, he brought a pamphlet covering common law associations.

"I do not recall whether he claimed that was a decision by one of the courts or a ruling of the Department, but my attorney then told me that I was subject to the penalty as the law stated, if I did not surrender.

"I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me. There was no discussion of the question of immunity between me and Southworth, or between me and anyone else. The three (3) declinations of trust were offered by defendants and admitted by the court without objection, the same being declaration of trust of the General Lee Interests No. One, General Lee Interests No. 2 and General Lee Development Interests, which said declarations of trust in the order named are as follows:"

Which declarations of trust are fully set out in the record, and it is not necessary to make same a part of this petition.

Contract dated the 12th day of April, 1922, between the General Lee Development Interests and petitioners was identified as an exhibit, and introduced in evidence, which is fully set out in the record, and which

it is not necessary to make a part of this petition. The witness Charles Sherwin continued to testify as follows:

"The three declarations of trust just introduced were recorded in the records of deeds, Tarrant County, Texas. Our list of stockholders was kept in our stock ledger. No one had a list of our stockholders save and except us and our companies, and no one had a copy of the contract between Mr. Schwarz and myself (Sherwin) on the one hand, and Mr. Lee upon the other. That document was not recorded. He (Southworth) inquired into the date of incorporation, and we answered every question and he put down the answers to each and every question on the questionnaire. I am certain we answered every question and I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. Our answers were made truthfully—they spoke the truth. We furnished him (Southworth) a true list of the stockholders that he demanded, and their addresses. I gave him information concerning the plan of operation of the three companies, and made out separate questionnaires for each company, that is, the General Lee Interests, General Lee Interests No. Two and the General Lee Development Interests, of which Mr. Schwarz and myself (Sherwin) were trustees."

On CROSS EXAMINATION, the witness Sherwin testified:

"My reply to the questionnaire was not sworn to. None of my replies were sworn to, and I never testified under oath as to any of these facts. There was a hearing held just before Mr. Southworth—I mean by hearing before him (Southworth) his visit and talk to us. There was a reg-

ular hearing. I know this because questions were made and answered at our office.

"Our evidence was not taken down by a stenographer. We were not just talking to Mr. Southworth and having a conversation with him about these things, we were answering questions that were put to us. Records were made of the answers given right then by Mr. Southworth, and Mr. Schwarz and myself. These records have been returned to the Federal Trades Commission. I have no private memorandum of it. It was answered in that questionnaire, that is what I mean. When we started to answer his (Southworth's) questions, we did not decline to answer any of them upon the ground that they might tend to incriminate us, but we refused to answer any question before he made his appearance, and after his first appearance at our office, we refused to answer the questionnaire that was mailed to us, and ignored it. The declaration of trust were on file here in Tarrant County at the time we furnished copies to the Federal Trade Commission. The information we furnished Southworth outside of the declarations of trust, were contracts—every contract we had in the office, drilling contracts and contracts for leases and contract with General Lee. No other person had copies of those contracts, except the drilling contractors who had copies. I do not believe the parties from whom we secured the lease had copies. I have searched my memory and I would have no way of telling at this time whether the other parties with whom these leases were made had copies. The leases were recorded. In addition to this, I gave Southworth the addresses of the largest stockholders we had at that time. We let him make notes from correspondence which he wanted to read, and this

correspondence related to the purchase of interests by some of our stockholders who had already purchased stock. In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed him (Southworth) other letters in which complaints were made that had not been adjusted. He specifically called for those letters. He must have known that there were complaints from the stockholders in our files, because he asked for letters on them. He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints if any we had at that time. My attorney was not present at this time, and I had not previously consulted him with reference to this question. I had consulted him with reference to whether or not we would answer the questionnaires. With respect to the questionnaires, I answered that we gave him (Southworth) the name of our company and the date of its formation and incorporation, and those facts were already a public record. The other questions related to the state of incorporation, the statutory office, principal business office; the fourth question relates to the place of business, and that was shown in the declaration of trust. I do not have a copy of our reply to this questionnaire at this time. I have been looking for all of those records but we have moved several times and I have not been able to find it. I have been looking for a copy of these answers but I do not remember whether we kept one or not. I have not yet found our replies to the questionnaires.

"In answer to the sixth question, we answered,

that our company was authorized to do business in no State other than Texas.

"To the seventh question we answered, that our company was not authorized to sell stock or securities in any State other than Texas.

"The eighth question stated the amount of our preferred and common stock authorized to be \$250,000.00 of the par value of \$1.00. This was also shown by the declaration of trust.

"The ninth question showed the amount of preferred and common stock issued.

"The tenth question and answer showed the amount of preferred and common stock the companies intended to issue. This was shown in our declaration of trust also.

"The answer to the eleventh question shows the promoters and organizers, to be Robert A. Lee, H. H. Schwarz and Charles Sherwin. This was shown by the declaration of trust.

"The answer to question twelve, advised him (Southworth) and the Federal Trades Commission of the previous business connections of the promoters and organizers, and I gave them a brief description of what business we (the organizers and promoters) had been in before. I believe we covered the period of six or seven years in giving this information, and this information showed that we had been engaged in legitimate business.

"The answer to the thirteenth question stated that no compensation or profit was received by the promoters and organizers.

"The fourteenth question was: 'Annex copies of all promoters agreements and proposals.' Our

reply thereto was, we furnished him the contracts for the drilling of the wells, and the contract for the acreage, and the contract with Robert A. Lee. The Robert A. Lee contract covered the entire organization, and how it was to be operated and carried on. Briefly it provided for the drilling of ten wells; for the exchange of capital stock in the General Lee Development Interests, and the form in which we were to sell these interests. This is the contract with reference to the third company, that is, the company known as the General Lee Development Interests.

"The contract provided for compensation to General Robert A. Lee, and in which contract it was stated that the compensation of Robert A. Lee was to be Fifty (\$50.00) Dollars per month, and ten per cent (10%) of any production obtained. The ten wells were to be drilled or acquired, and we gave them this information. At the same time, in response to their demand, we gave them (Southworth) other literature—Yes, all literature we had issued, prospectuses, letters, booklets, etc. Some of these things were such that we had kept hidden. I can specifically state what ones—some particular form letters that we had. Copies of these had been sent out to purchasers of interests. Not a very great number of purchasers, probably several hundred. They were not published anywhere in newspapers or places like that.

"In reply to the fifteenth question, we gave them the information as to how much stock was issued on the organization of the company, the same being \$250,000.00, the total amount of the capital. We told them, (Southworth) that the stock was issued to Lee, Schwarz and Sherwin, for the

consideration of the contracts, which was in pursuance of the agreement with R. A. Lee.

"The seventeenth question, asking the amount of stock issued to promoters, organizers, etc., was covered in the contracts already given to him.

"The eighteenth question asking for appraisal value of any item mentioned in question seventeen, was answered by our stating that this was answered in the contracts.

"To the nineteenth question we answered—That no bonds, debentures and secured obligations have been issued.

"To the twentieth question, we answered—That no bonds, debentures and secured obligations were proposed to be purchased by the company.

"To question twenty-one, we answered—that our companies were not the result of any consolidation, merger or reorganization.

"To question twenty-two, we answered—that no subsidiary are controlled by stock ownership or otherwise by us.

"Question twenty-three asked for the name and address of each officer, director, promoter and organizer who has been or is now connected with, or interested in the company, with their experience and qualifications for present positions. That was answered: R. A. Lee, Fort Worth; Harry H. Schwarz, Fort Worth; and Charles Sherwin, Fort Worth, Texas. I do not believe anything was said in this answer about our qualifications and experience, as I believe it had been answered before that. I believe there was a question previous to that (23), which asked

us to give him the previous business experience of the trustees, and I do not recall just how that question was answered, but we gave him a list of legitimate employment.

"In answer to question twenty-four which asked for the names and addresses of the seven largest stockholders; the number of shares held by or issued to each, the consideration paid by them respectively, we gave the names and addresses, and the amounts owned, and the consideration, which was par value. I do not recall the names given, but they were legitimate names and addresses.

"We answered in reply to question twenty-five, that no stock had been donated to the treasury.

"Questions 26 to 29, inclusive, were under the head of business. No. 26 asked us to describe briefly, the business purposes and object of the company; where it was to be conducted, the facilities and plant available therefor, and I do not recall exactly how that question was answered, but I know we answered it. That the purpose was to drill ten wells, and I believe we stated substantially the purpose of the business as was set out in the declaration of trust. I believe we stated the office to be at Fort Worth, with one well now drilling, and gave the depth of that well. I do not recollect the answer with respect to the facilities of the plant, but I believe we covered every question pretty thoroughly.

"Question 27 was: 'When did the company commence business, the amount of capital stock paid up at the commencement of business?' And we answered: 'April 12th, 1922, as the date when the declaration of trust was either filed or executed,

and as the commencement of business, and that there was no capital stock paid up at the commencement of the business.

"The answer to question 27 answered question 28.

"In answer to question 29, we stated that the company has not taken over any existing business.

"Question 30 was as follows: 'What is the company's immediate plan of action?' What amount of money will be necessary to accomplish it; how is it proposed to raise this money; what stock or securities are to be sold therefor, or have been sold, and on what basis?' And we answered that the company's immediate plan of action was to complete a well then drilling, and drill additional wells as fast as possible until the contract calling for ten wells had been complied with, substantially the same as proposed in the declaration of trust, and all the literature sent out. I do not believe I stated the amount of money this plan would necessitate at that time. We stated that we proposed to raise the money from the sale of the interests (Stock). We further answered that the stock or securities to be sold and have been sold were stocks belonging to the trustees, that is, the capital stock, the full amount, and on the basis of par value.

"Question 31 is as follows: 'Does the company sell or propose to sell its stock direct, or through others—state who?' And I answered that the company was not selling its own stock, but was selling stock that belonged to the trustees, the company had no stock for sale, and I do not believe that I particularly answered whether the

stock was to be sold through others or direct, although I did go into the method of disposing of the stock in some question or in some explanation.

"Question 32 required us to give the names and addresses of all stock or securities agents or representatives now in the field, and that is where I answered the question that we had some Chicago brokerage house handling some of the stock for us, and I believe I gave the name of Leslie Vincent & Company.

"Question No. 33 required us to state how much has been paid to date as commission, bonuses or salaries to stock salesmen, and I believe I answered by saying—none by the company. Leslie Vincent & Company did not make sales to a number of purchasers of stock under their own name. In most instances to the best of my recollection and knowledge, they did not use their own name. They were under no instructions with respect to this whatever. I did not see any correspondence that was sent out, or letterheads of the Leslie Vincent Company in connection with the sale of stock in the General Lee Companies. They had letterheads and wrote to us on their own letterheads. I do not know whether they had business cards or not.

"Question 34 is: 'How much has been spent to date for advertising in connection with the sale of stock?' and I believe I answered that none had been spent by the company. The questions in the questionnaires were the same in each instance, that is, with respect to each of three companies, and the answers thereto were substantially the same. In the instances concerning the amount

spent to date for advertising in connection with the sale of stock, our answer was—none in each instance. I would sometimes vary in stating the amount of the capital stock and price, but as to those general questions, the answers were practically the same.

“Question 35 is: ‘State the compensation, commission or bonuses paid to stock salesmen, the discount and profit to each,’ to which I answered—none by the company.

“Question 36 is: ‘Has stock been sold or apportioned enblock to any promoter, broker, or fiscal agent?’ This question was answered by stating that the company had not accepted any notes in payment for stock sold to promoters, brokers or fiscal agents.

“Question 38 is: ‘At what price are company stock or securities to be sold?’ And I don’t recall just how I answered that. I don’t know whether I stated that it was to be sold at the option of the trustees or whether I said par value.

“Question 39 is: ‘What percentage of the gross proceeds thereof are to be paid by the company?’ And I answered—none.

“Question 40 is: ‘Have the stocks or securities which company proposes to sell, been underwritten, and on what basis, or is company assured that all of the funds needed will be obtained?’ And I believe I answered that by saying—this stock was traded for the leases and contracts, but I do not recall how I stated the company was assured that all of the funds needed would be obtained, but I believe I did give some answer to that question.

"Question 41 is: 'To what extent are subscriptions to be made, conditional on obtaining total subscriptions or a given amount, and to what amount?' And I believe I answered 'To no extent.'

"Question 42 is: 'Annex copies of all literature, advertisements, prospectuses and circulars used in the furtherance of the sale of stock and securities by company or others and any instructions to stock salesmen?' I have previously answered that—I gave them literature and form letters. The literature was being used in campaign for the sale of stock, and advertisements were in oil papers or daily papers, and the prospectuses were sent to persons solicited for the purchase of stock, but there are some letters that were not—they were sent out to all stockholders, and were letters that we would in every case send to some stockholder, that is, in every case where that form seemed to be appropriate for the exigency that had developed.

"Question 43 is: 'Describe accurately but briefly the properties acquired, real and personal, with all improvements or plants now on or to be placed thereon; the amount paid or to be paid in money, stock, bonds, securities or otherwise thereof, and the actual value of each portion or parcel thereof?' I answered that by giving copies of each individual lease that we had at that time assigned to the General Lee Development Interests, which leases were recorded in some public office. I told them of the physical properties, drilling well; the structure, and in addition to telling them, I took Mr. Southworth up to see the properties. As to the amount paid, I believe I just gave what I

considered the potential values under certain considerations and certain conditions.

"Question 44 is: 'Give similar description of property or properties which the company has contracted to acquire or intends to acquire?' And I answered by stating that was some conditional leases, and I gave them copies of them.

"Question 45, with respect to financial conditions is: 'Annex trial balance, last balance sheet, or balance sheet prepared for the purpose of this report; profit and loss accounts?' And I answered by giving this. The bookkeeper took care of that for us. I filed an income report for the General Lee Development Interests, but not on the other two.

"Question 46 is: 'As to the assets enumerated therein, describe briefly each item, state the actual cost, or present actual value thereof, with appraisal by disinterested appraisers?' And I believe we answered by saying—'We had no appraisal made.'

"Question 47 is: 'If the company is mining or oil company, furnish full report of its properties, acreage or leases?' Our answer to this—I just gave them what we had previously given them.

"Question 48 is: 'Give the gross income from operations or production during the preceding twelve months?' And I answered, 'None.'

"Question 49 is: 'State any existing facts or probable development concerning your company, its officers, directors, managers, promoters, or representatives; properties, business or prospects, which have not been covered by preceding questions, but which should be known to an investor?'

And I do not recall just what information we gave on that particular question, as we had been giving all of the facts as we went along.

"Question 50 is: 'Do you offer to accept, exchange or dispose of thrift stamps, war-savings stamps or liberty bonds in order to sell your securities or stock?' And I answered 'No.'

"Question 51 is: 'If you answer to question 50 or any part thereof, 'yes,' will you voluntarily cease and desist from such practice in the future?' And that was answered by the preceding answer.

"I did not at any time, particularly at any place in my written responses to this questionnaire, refuse to give any information called for in the questionnaire, on the ground that it would tend to incriminate me, nor to any question asked me by the representative of the Federal Trade Commission, and neither did either of the trustees in my presence. The information I gave, was as far as my information went, or what I considered legitimate. I gave information to a representative of the Federal Trade Commission outside of the information in this question. Mr. Southworth wanted to know more about the plans after reading the contract with General Lee; he wanted to see the correspondence. I showed him the correspondence, both good correspondence and that I considered such, and the complaints—adjusted complaints and complaints that have not been adjusted. I did answer all questions that were demanded. There was so much information given at that time I do not recall any particular information given. It was with respect to the general workings of our business organization and every-

thing in connection with it. There was never any order made by the Federal Trade Commission that was brought to my knowledge with respect to my business, nor did they make any order against us. There was no other formal hearing at which we appeared, which was presided over by any member of the Federal Trade Commission or anybody connected with it, other than by Mr. Southworth. The same man (Southworth) appeared in our office numerous times in the same capacity, and I suppose there would be just as much dignity and importance to one visit as there would be to a number. It was the same man each time, and acting in the same capacity.

"The Postoffice Inspector Swinson visited our office. We had a number of rooms—one suite of rooms in which all of the three companies were officed. Mr. Swinson first visited us last August. The visits of Mr. Southworth had ceased, I believe, just a short time previous to Swinson's first visit. I imagine something like a week or two. I knew what the official capacity of Mr. Swinson was. He talked to me about the business in question and its operations, and requested that I give him information. He did not make any threat of any kind. I talked freely to him, as he seemed to have about as much information as I had at that time. I told Mr. Swinson on that first visit and all other occasions thereafter, substantially the same as I had told Mr. Southworth—practically the same, not quite as much detail. I do not believe the question ever came up between Swinson and myself as to whether I had been talking to Mr. Southworth."

On RE DIRECT EXAMINATION, Mr. Sherwin further testified:

"We had a contract, Lee, Schwarz and myself with these concerns (meaning the three companies) that we were to dig the well and furnish the money therefor, and the stockholders were to get the acreage and the wells and the production, and what was left over from the sale of stock, after the completion of the wells, was to be our profit. The leases and wells were to go to the stockholders. If there was anything left of the \$250,000.00 worth of stock after these wells were drilled, it was to belong to us. That was one of the contracts we turned over and explained to Mr. Southworth. The contracts between ourselves and the driller were not recorded. We furnished these documents to Mr. Southworth. The leases in most instances as recorded, showed the consideration to be one dollar (\$1.00) and other valuable consideration, and in some instances maybe ten dollars (\$10.00). The real consideration for these leases I explained to Mr. Southworth.

"I took Mr. Southworth out and showed him our holdings at that time, and explained just how it was. He wanted to know exactly how we expected to make any money, and I explained to him that in all further wells being drilled or to be drilled we expected to own offset acreage, and did not expect to drill any more wildcats. This first well we were drilling was a wild cat. That was in Denton County, near Roanoke. We had 6163 acres in leases or land surrounding the well, and we explained to Mr. Southworth.

"When Mr. Swinson came to our office he did not state where he got his information, and I stated a moment ago, that he seemed to be familiar

with the transactions, and I got that from his conversation. He did not state where he got his information, but he did not get it from me; but I did give him certain additional information as he wanted and requested. I knew he was an official inspector under the United States Government'.

On RE CROSS EXAMINATION, the witness Sherwin further testified:

"Mr. Mendenhall called at the office of our company, Mr. Swinson brought him and introduced him. I knew he was connected with the Government. He made no demand or threat. I let him examine the books. Inspector Dawkins called upon me previous to Inspector Swinson. I gave him some information about the business operation of the company. I do not recall just what we gave Mr. Dawkins. I do not think we gave him anything the first time he called. We asked him to send us a questionnaire, which he did, and I answered it. I knew he was a postoffice inspector. He did not make any demand or threat. All of these gentlemen (Postoffice Inspectors) came after I had been convinced by Mr. Southworth that I would have to give up this information. I had noth been convinced by Mr. Southworth that I would have to give up this information to anybody that came along, but I had been convinced that I would have to give it up to the Federal Trade Commission. I assumed that the Postoffice Inspectors had nothing to do with the Federal Trade Commission, and in giving the Postoffice Inspectors the information I was not acting under compulsion that had been exerted upon me because of the conversation previously had with Mr. Southworth. I gave it under the advice of coun-

sel. The information I gave to the Postoffice Inspector Dawkins, was—the questionnaires was answered—both Mr. Schwarz and I answered it. I was present. I can tell you some of the things they wanted to know. To the best of my recollection, it practically covered the same questions that were asked in the questionnaires of the Federal Trade Commission. I told them practically the same things as I told the Federal Trade Commission, with the exception of not giving them any contracts. I do not recall whether they asked for any contracts in the questionnaire or not. I do not believe I declined to give any information they asked of me, and if my memory serves me right, if they did ask for contracts I gave them to them. I do not believe I showed them (Postoffice Inspectors) any of our private correspondence. I did not give them or show them a list of our stockholders at that time, that is, in reference to the correspondence with Mr. Dawkins. I made other statements in the postoffice building, and Mr. Swinson called at the office several times, and I was present sometimes and sometimes Mr. Schwarz and I were both present, and they asked for additional information, and in response to questions asked by them upon this occasion, we did give them a list of the stockholders, or tell them who the stockholders were. They asked to see some correspondence, and I believe Mr. Schwarz exhibited some to Mr. Swinson in response to a particular demand, I believe in reference to Mr. Throm, one of our stockholders. They asked for correspondence had between Throm and us, and we gave it. I am sure we showed him some of it. There was no other reason why it was not shown to him, other than the fact that it was mislaid at that time.”

On EXAMINATION BY THE COURT, Witness Sherwin further testified:

"Question by the Court: 'Now, going back to the time when your attorney was present, how much of the law relating to the powers of the Federal Trade Commission was read to you or in your presence on that occasion, or on those occasions that you have referred to?'"

"Answer: 'As I recall it, the entire article pertaining to the penalty for refusing to comply with the demand, and also the question as to whether or not the common law trust came under the jurisdiction of the Federal Trade Commission, was read to me.'

"Question by the Court: 'Was this particular section read to you, which recites to you that the Commission shall have power to require by subpoena, attendance of witnesses, and produce such documentary evidence relating to any matter under investigation—was that read to you?'"

"Answer: 'Yes sir, I believe the Commission issues a booklet that the examiner had with him, showing that part—yes, that was read to me.'

"Question by the Court: 'Was this also read to you, that no person shall be excused from attending and testifying or from producing documentary evidence before the Commission, or in obedience to a subpoena of the Commission, on the grounds or for the reason that the testimony or evidence, documentary or otherwise, might tend to incriminate him, or subject him to a penalty or forfeiture—was that read to you?'"

"Answer: 'Yes sir.' "

"Question by the Court: 'Was this also read

to you, that no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, before the Commission, etc.—was that read to you?”

“Answer: ‘No sir, I do not recall having heard it. I did not read the booklet. I know what it contained because it was read to me. This portion was not read to me. No sir. Mr. Southworth did the reading of it, my attorney was not present at the time Mr. Southworth read it to me, and I did not say awhile ago that it was read in the presence of myself and attorney. When my attorney came, nothing was done other than he told me that I would have to answer those questions. That is all that took place when he was there.’

“Question by the Court: ‘Was this portion read to you—that any person who shall neglect or refuse to attend and testify to or answer any lawful inquiry, or to produce documentary evidence if it is in his power so to do, in obedience to subpoena, or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof, shall be fined, etc.—was that read to you?’

“Answer: ‘Yes sir.’

“Question by the Court: ‘Was this read to you—No natural person so testifying shall be exempt from prosecution and perjury in so testifying, etc.’?”

“Answer: ‘No sir’.”

On RE DIRECT EXAMINATION the Witness Sherwin further testified:

"I had the advice of counsel with respect to answering questions of the postoffice inspector. I advised with several attorneys, I believe it was in November, but after I had given information to Mr. Dawkins. I answered one questionnaire to Mr. Dawkins. My attorney advised me to give these Inspectors everything they wanted, and did not suggest whether it would be a matter of policy or duty. I came to the conclusion that it was a matter of duty to give it to them."

It was agreed that the record should recite that the petitioner H. H. Schwarz would testify substantially to the same facts as petitioner Charles Sherwin.

J. S. SWINSON, called by the Government, testified as follows:

"I am a Postoffice Inspector, and I had charge of the investigation of the three General Lee Companies. I directed other Inspectors who were engaged in that investigation. Prior to my reading the motion I did not know that there had been any investigation of those three companies or the defendants in this General Lee indictment by the Federal Trade Commission. I learned this three days ago, when I read the motion in the United States Attorney's office. I did not get any information from the Federal Trade Commission or any of its representatives with respect to the defendants or their companies, and no complaints came from the Trade Commission against these defendants—they came from individuals. I got some letters, circulars and prospectuses from the company—a great many. I did not get anything like a full list of the stockholders. I did

get a few names and addresses. I got a statement from the defendant Sherwin. He said he consulted an attorney before signing it. He took it away with him and brought it back signed.

"I know John F. Southworth. I met him last fall. I did not talk to him about the General Lee matters. As near as I can get at it, his business is to procure information for the Federal Trades Commission of the United States Government. I think his title is Special Examiner, Federal Trade Commission. Sherwin and Schwarz both gave me information. I got information and a statement from each one, that is, Sherwin and Schwarz and General Lee showing and concerning operation of these three companies; that they were promoting it; the amount of money collected and how the operations were being conducted. We discussed two or three names of stockholders that we had complaints from. I called their attention to these complaints and told them the parties had been complaining and their names. I asked for correspondence between them and complainants, particularly a telegram sent to an agent who had sold stock to Throm. Schwarz reported that he could not find it. I afterwards asked them that I might be permitted to see the whole Throm file, but that was declined. I think that was the first of this year. This was the first declination I got from either of them. I believe it was evidence I specifically asked for. The reason they said they wanted to see their attorney before signing the questionnaires, and what gave rise to that, was, we had talked about the operations generally; how much money that they had collected; what they had done; how many stockholders they had, and complaints received. We took notes, and the

statement was dictated to a stenographer by myself in their presence, and that was read—each one took the statement and said he would like to consult his attorney before signing it. Each one carried the statement away, and later returned with it signed by each one. That was the only time the matter was mentioned or came up between us, and they simply said it was best not to sign any statement at all until after consulting an attorney. That it was true that they had no objection to signing it, but it was best to see their attorney. When I first approached these defendants I told them who I was, and what my business was, and that they were not obliged to answer any questions unless they wished to; that we would like to have the facts and find out about the business, and see if the complaints made were justified, and each one of them said they would be perfectly willing to give any information and answer any questions, and I told them further that the information that they might give might be used against them, that there was a chance for that, although I did not know what might be done.

“I never heard of the Federal Trade Commission’s investigation from them or anyone, until I read this concern. The first time I ever heard anything about the Federal Trade Commission investigating them, and we never got any information, documents or letters of any kind or description, and I never had any conversation with Mr. Southworth or any other agent of the Federal Trade Commission regarding these people that I recollect. Mr. Southworth was investigating another case. I saw him two or threet imes. I had charge of the investigation of this particular case, and assisted in presenting it to the grand jury.

I had and presented to the grand jury, evidence obtained from these defendants in the manner and at the time heretofore indicated, including the statements signed by them. I think I read part of the statements to the grand jury."

H. L. ARTERBERRY, called by the Government, testified as follows:

"I am Special Assistant United States Attorney, and as such presented the case to the Grand Jury that resulted in the indictment now under consideration. At that time I did not know anything about the investigation of the defendants or their companies by the Federal Trade Commission. I never heard that until the filing of their motion in the case. Nothing developed in the grand jury proceedings that would show or indicate such, and I never heard of it. Mr. Schwarz was the only defendant who appeared." Tr. 128.

It was agreed by attorneys for Petitioners and the Government:

That the Government's exhibits one, two, and three, the same being the declarations of trust of the General Lee Interest No. One, General Lee Interest No. Two, and the General Lee Development Interests (which are fully copied in the record) were introduced by the Government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin Schwarz testified that they gave to John F. Southworth, Agent of the Federal Trade Commission. That the Government's Exhibit No. ...., the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12, 1922, and the same containing a copy of the agreement by

and between R. A. Lee, and Sherwin and Schwarz, concerning the compensation of said Robert A. Lee for his services in said company (a copy of which contract is set out in the record) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and this last mentioned exhibit was introduced by the Government in the trial of this case on its merits. (Page ——)

After hearing the plea of immunity as set forth above, and the evidence thereon as herein set forth, the trial court overruled and denied the same, to which the petitioners excepted, and preserved their exception by assignment of error. (Tr. ....)

Thereafter a trial was had upon the merits, before the court and jury, and petitioners presented their plea of immunity to the jury, and all the evidence thereon as above set out, and petitioners then requested the court to instruct the jury to return a verdict of 'not guilty' against each of them, which request was made by motion and by special requested charge. Which motion the court denied and refused to give the special requested charges, to which petitioners excepted. (Tr. 130; 138).

Petitioners then requested the court to submit to the jury, in appropriate language, and in terms of law, the issue of immunity as raised by their plea in bar, and permit the jury to pass upon this plea separate and apart from the issue of 'guilty' or 'not guilty', which motion the trial court refused, to which petitioners excepted. (Tr. 130-131; 138-9).

Petitioners then prepared in writing, and presented special charges to the court, which they requested the court to give, which charges are copied fully in the petition—under this cover—and it is not deemed necessary

to set the same out in full here. Which charges the court refused to give, to which petitioners excepted, and preserved their exception by assignment of error. (Tr. 131-133; 138-142).

The trial court then instructed the jury on the merits of the case, and on the issue of immunity, as follows:

"Now, there has also been introduced in this case, gentlemen, a special plea of the defendants Sherwin and Schwarz, claiming immunity from prosecution because of certain transactions had before the Federal Trade Commission, the nature of which are set forth in detail in the evidence stipulated in the case, and which need not be detailed at this moment. With respect to the plea as indicated by the court the other day in the judgment of the court, there being no question of facts involved, and counsel being of the opinion that there is no question of facts involved, there is no conflicting evidence, it being purely a question of law presented, the court therefore will instruct you, and does instruct you to return a verdict in favor of the Government and against the defendants with respect to the plea of immunity, and I have prepared for your use, a special verdict on the question of the plea of immunity, and have indicated that it is to be returned by you for the Government and against the defendants by direction of the court, and I will ask your foreman before returning into court to sign that verdict." (Tr. 134).

To which action of the Court petitioners, excepted and properly preserved the same. (Tr. 137-138.)

The jury returned a verdict as instructed by the court on the issue of immunity, and further found petitioners guilty on each and every count of the indictment, which verdict was accepted by the court. (Tr. 58-61.)

The court sentenced petitioners, as set forth fully in

the petition under this cover, and it is not deemed necessary to copy the judgment here. (Tr. 60.)

Petitioners presented their writ of error to the Circuit Court of Appeals for the Fifth Circuit, and the judgment of the trial court was affirmed. (Tr. 167-175.)

Motion for rehearing was presented and denied. Tr. 192.)

### **SPECIFICATIONS OF ERROR.**

#### **1.**

The trial court erred in overruling, and in not sustaining petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special charge; (Assignment of Error No. 2 and 4; Tr. 137-138) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that petitioners were summoned (or subpoenaed) by the Federal Trade Commission to, and they did, answer a lawful inquiry of the Federal Trade Commission, and there was demand of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these petitioners by virtue of the statute, and they should not have been prosecuted or subject to any penalty

or forfeiture for, or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of the evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

## 2.

The trial court erred in peremptorily instructing the jury to return a verdict against petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 137) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against petitioners on that issue. (Tr. 134). And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without

contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted, and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful inquiry, or in obedience to a lawful requirement and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against petitioners on their plea of immunity.

## 3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the rights of petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition, (Assignment of Error No. 5; Tr. 138-142) because the statute gave petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise before the Federal Trade Commission. The petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon, and same presented a question of fact and

the court should have given petitioners' requested charges as the same properly presented the law applicable to the issues.

## 4.

The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not, within the terms of the provision of the statute," because this is in our opinion an incorrect interpretation or application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, with regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath. The statute says a person can be punished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either, in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any trans-

actions, matters or things concerning which he may testify or produce evidence. (Page —)

## BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR CERTIORARI.

Article 8836, as enacted in 1914 and 1916, having to do with the Federal Trade Commission and those coming under its jurisdiction, not only creates the commission but defines its functions and authority, among which it is empowered to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of any corporation, joint stock association or partnership other than banks and common carriers, and their relations to other corporations, associations and partnerships. (Art. 8836-f.) This article further empowers the commission OR ITS DULY AUTHORIZED AGENTS, to require the attendance and testimony of witnesses and the production of documentary evidence by said witness, relating to any matter under investigation, (Art. 8836-I) and it is made an offense on the part of the individuals having such information to "neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena, or **LAWFUL REQUIREMENT OF THE COMMISSION,**" and a failure to so comply with such lawful requirement (Art. 8836-j) carries with it the imposition of a penalty of not less than \$1,000.00 nor more than \$5,000.00 or by imprisonment for not more than one year or by both such fine and imprisonment.

Unless immunity be granted to the person so testifying and furnishing documentary evidence, and meeting the other **LAWFUL REQUIREMENTS OF SAID COMMISSION** it would be in direct violation of the Fifth Amendment to the Constitution of the United States, and to

meet this provision of the Constitution, Art. 8836-i provides, "no person shall be excused from attending and testifying, or from PRODUCING DOCUMENTARY EVIDENCE BEFORE THE COMMISSION or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him might tend to criminate him or subject him to be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

Thus we find a statute whereby the Federal Trade Commission in the furtherance of an investigation may require any individual to give testimony and furnish documentary evidence concerning a matter under investigation by said Commission, and when such testimony is given, the individuals giving the same are immune from prosecutions about any transactions, matter or thing concerning which he had previously testified or furnished documentary evidence.

Sherwin and Schwarz were engaged in the oil business, the drilling of wells and selling of stock; they had organized three companies, to-wit, General Lee Interests No. One, General Lee Interests No. Two, and General Lee Development Interests as evidenced by their three respective declarations of trust (Record pp. 69, 80 and 88), and Sherwin and Schwarz were officers of each of these joint stock associations, were drilling oil wells, purchasing mineral leases and selling stock in each of the said companies. These petitioners had employed Robert A. Lee in whose name the companies were organized and operated (Record pp. 104 and 105), and these petitioners were to pay Robert A. Lee the sum of \$50.00 per month, and ten per cent of the profits of said company (Record p. 102).

These petitioners had secured drilling contracts and had a list of all of the purchasers of stock in either or all of their companies, and all of these matters or at least a greater portion thereof, were known only to these petitioners, and the documentary evidence was possessed only by them.

The Federal Trade Commission was making an investigation of various oil companies, and acting through Otis B. Johnson, its Secretary, the Federal Trade Commission mailed to petitioners, which was by them duly received, a letter demanding all of the information and facts possessed by these petitioners concerning the operation of these three companies (Record p. 64) which letter is as follows:

"Washington, July 30, 1922, General Lee Development Interests, Edwards Building, Fort Worth, Texas, Sirs: **This Commission officially requests that under sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you cannot answer immediately, please supplement your first statement with seven days upon receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. Your attention is respectfully called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of Schedule A herewith enclosed) for any failure, refusal, delay or falsification of or in any report made in answer to this Commission's lawful inquiry.**

"This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of

filing this information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

Petitioners refused to give the testimony and information requested in said letter. Later on, John F. Southworth, agent of the Federal Trade Commission, called at the office of the General Lee Company, which was in charge of these petitioners (Record p. 65) and demanded that petitioners furnish such information. Petitioners replied that they did not have to furnish him with the information. Thereafter these petitioners complied with said demand and furnished the information, gave the testimony, answered the questions and furnished documentary evidence, as shown by the testimony of petitioner, Sherwin, beginning (Record p. 65)

"Southworth then said, we did come under the jurisdiction of the Federal Trade Commission and that by not answering the questionnaire sent to us, we were committing a crime subject to a penalty of imprisonment and fine, either or both. I told him I had consulted my attorney, Mr. Turner, at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we did not have to fill out or file any questionnaire sent to me, by the Federal Trade Commission. Mr. Southworth then asked me for the address of my attorney and I gave it to him. He again told me we were committing a crime, and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. Southworth had an appointment with Mr. Turner and they met in our office, and read the law to Mr. Turner, Mr. Schwarz and myself, after which Mr. Turner then advised me that in accordance with that law we were com-

mitting a crime by not answering the questions. We then gave him (Southworth) everything that he demanded, the declarations of trust, copies of contracts, copies of leases, showed the record of our books, gave him a list of the stockholders and some correspondence we had on some of them. We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him; in fact, we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, the leases were partly typewritten and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all of the time, and acted together in furnishing Southworth this information.

"This gentleman (Mr. Southworth) came to our office a half dozen times before we gave him any information. After we began furnishing him with documentary evidence and information, he came to our office about twenty times. When he left our office and this city, he left with these documents in his possession. After Southworth left the city we received communications from him by telegram. The four documents you now hand me are the two telegrams received from Southworth by us, and of my two replies thereto, and they are marked Exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence) and are as follows:

"No. 4. October 27, Eldorado, Arkansas, Charles Sherwin, care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, Eldorado, not received. Southworth."

"No. 5. Fort Worth, Texas, October 27, 1922. John

F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz."

"No. 6. November 8th, Kansas City, Missouri, General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth."

"No. 7. November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin."

These petitioners further testified in substance (Record p. 68) that they refused to give Mr. Southworth any of the information, testimony or documents that he was seeking for the Federal Trade Commission, and as agent thereof, until they were convinced that it was their duty, by virtue of Art. 8836 and the subdivisions thereof, to furnish the same; that Southworth presented and read this law to them, and in effect threatened them with prosecution unless they did surrender this evidence and these documents. Further testifying, these petitioners said (Record p. 69): "I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me," and further testifying, petitioners said (Record p. 105):

"No one had a list of our stockholders, save and except us (Sherwin, Schwarz and Lee), and our companies, and no one had a copy of the contract between Mr. Schwarz and myself on the one hand and Mr. Lee on the other; that document was not recorded. He, Southworth, inquired into the date of incorporation and we answered every question and he put down the answers to each and every question on the questionnaire. I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. . . . He (Southworth) reported himself

to be an agent of the Federal Trade Commission. . . . When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaire sent us from Washington" (Record p. 65.)

Further testifying with respect to the character of the testimony, information and documents furnished the petitioners said (Record p. 107)

"In addition to this, I gave Southworth the address of the largest stockholders we had at that time. We let him make notes from correspondenec which he wanted to read, and this correspondence related to the purchase of interests of some of our stockholders who had already purchased stock. In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. **We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed Southworth other letters in which complaints were made that had not been adjusted. He specifically called for those letters. . . . He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints, if any, we had at that time.**"

The questionnaire contained some fifty questions with subdivisions thereunder, which sought every character of imaginable information respecting the organization and operation of the three companies in which these petitioners were interested, were fully answered by these petitioners to Southworth, and it gave to the Federal Trade Commission, through Southworth as their agent, every conceivable bit of knowwledge which these petitioners possessed without an exception, including the taking of the said John Southworth out to the field upon the lease where the well was being drilled, and there explaining to him in detail the physical property

and their mode of operation. The questions and answers to the questionnaire fully disclosed all the methods employed by these petitioners, both private and public. (Record pp. 108 to 117 inclusive).

It was established beyond any peradventure of a doubt, and was uncontradicted that John F. Southworth was and is the authorized agent of the Federal Trade Commission, such as is mentioned in Article 8836, not only by the documents and the testimony of the defendant's, but by the government's witness J. S. Swinson, who testified that he was a postoffice inspector, and that

"I know John F. Southworth (Record p. 126) I met him last fall \* \* \* As near as I can get at it, his business is to procure information for the Federal Trade Commission of the United States Government. I think his title is Special Examiner Federal Trade Commission."

Article 8836 provides, "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense, etc." It will thus be observed that these petitioners at first refused to give this testimony, notwithstanding the letter from Johnson, the Acting Secretary of the Federal Trade Commission, and notwithstanding the five or six visits of Southworth to their office, and his appeals to them personally demanding said information, and only gave said testimony upon being convinced that under Article 8836 they were not permitted to refuse to give same FOR ANY REASON and after this law was read to them, and explained, both by Southworth and attorney for these petitioners to have that effect.

It is true no subpoena was issued, but inasmuch as

the witness was present before Southworth, it was unnecessary that a subpoena should issue. This question is fairly discussed and that principle clearly announced in the case of the United States vs. Armour & Company, 142 Fed. 808, in which case the court was discussing a similar question arising under a similar statute, granting immunity, known as the Interstate Commerce Act, which was enacted February 11, 1893, in which the court said:

"But it is insisted by the government that they had not given under compulsion because they did not give under what is known in law as a testimonial compulsion, and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. \* \* \* The subpoena is not necessary where the person is present in Court or within the verge of the court. The only object of the subpoena is to secure the attendance. It is superfluous when he is present, without subpoena. (United States vs. Sanborn, 28 Fed. 299 at p. 302) \* \* \* I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpoena is a useless and superfluous thing after the tribunal and witness are together. And I am also of opinion that under these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admission against interest and against the party producing them."

And while no oath was administered, yet from the sound reasoning set forth in the Armour case, *supra*, that neither a subpoena to require attendance nor oath for the giving of testimony was used, that neither was necessary, and that said proceedings and the testimony given at such hearing amounted to the same as a matter

of law as if the subpoena had actually been issued and the oath administered. In any legal proceeding a defendant may waive the issuance of a subpoena and present himself in court and obtain the same protection as if actually subpoenaed and likewise the government may waive the administering of the oath to a witness in either of which events the result of their having come in contact with each other for designated purposes would be the same.

It is apparent from the reading of Article 8836j that the subpoena and oath each might be dispensed with, for that an individual is penalized not only for refusing to attend and testify, but "OR TO ANSWER ANY LAWFUL INQUIRY OR TO PRODUCE DOCUMENTARY EVIDENCE," and while this is subsequently said to be in obedience to a subpoena, it also says, "OR LAWFUL REQUIREMENT OF THE COMMISSION," and certainly without dispute it must be said that Southworth had required these defendants "to answer any lawful inquiry" in obedience to a "lawful requirement of the Commission." And if he choose to waive the swearing of the witness on behalf of the government, the government ought not to be permitted to take advantage of it at any time thereafter.

The hearings by the Federal Trade Commission had before its agent, John F. Southworth, in which these petitioners furnished the testimony and documents aforesaid, was had beginning June 30th, 1922 (Record pp. 64, 67), and before the convention of the grand jury at which this indictment was returned, and before the convention of the grand jury which was March 12, 1923 (Record p. 1), and necessarily before the date of this trial.

The indictment and the several counts therein contained discloses that the alleged offenses set forth

therein were based upon the transactions, matters and things concerning which the petitioners had previously testified and produced evidence, documentary and otherwise, before the Federal Trade Commission, and upon these charges these petitioners were subsequently convicted (Record p. 58); in fact, some of the identical documents and contracts, or at least copies thereof, which petitioners testified they furnished to the Federal Trade Commission, and in which in some instances no one except these defendants had knowledge or copies until the same was furnished to John F. Southworth, was introduced as evidence against these petitioners upon the trial of this cause, on its merits, and was a part of the evidence used in securing their conviction. About this, the government can make no contention, because it is an agreement contained in the record respecting the same, which is as follows (Record pp. 128 and 129):

**"That the government's exhibits one, two and three, the same being the declaration of trust of the General Lee Interests No. One, General Lee Interests No. Two and the General Lee Development Interests, respectively (which are copied herein), were introduced by the government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission, and that each of these documents were recorded in the deed records of Tarrant County, at the time the copies thereof were furnished. That the government exhibit No. , the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12th, 1922, and the same containing a copy of the agreement by and be-**

tween R. A. Lee and Sherwin and Schwarz, concerning the compensation of the said Robert A. Lee for his services in said company (a copy of which contract is contained herein) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and that this last mentioned exhibit was introduced by the government in the trial of this case on its merits."

This alone, we think, is sufficient to show that the inquiry of the government as to the acts of the petitioners upon the trial of this case involved the same identical questions as were involved and inquired into and about by the Federal Trade Commission agent, John F. Southworth, when these petitioners were before him as a tribunal many months before any criminal investigation, such as finally culminated in the conviction of these petitioners, was given; but this is not all, in fact, is but a small part of the transactions, matters and things inquired about by the court in the trial upon the merits, but this can only be reflected by this tribunal, in the absence of a full statement of facts, by a reference to the allegations in the various counts of the indictment herein, the proof of which was necessary to a conviction.

It will be noted the first count of the indictment, in which the conspiracy, scheme and intent to defraud and artifice to obtain money and property by false pretenses, etc., refers exclusively to these petitioners' organization and promotion and sale of shares of stock in three oil companies named therein, to-wit: General Lee Interests No. One, General Lee Interests No. Two, and the General Lee Development Interests (Record p. 4), in the form of trust estate for the pretended purpose of engaging in the production and sale of oil and leases for profit, all of which information as to the methods, man-

agement and operation thereof was secured from these defendants by the Federal Trade Commission.

It is further shown in said indictment and in count one (Record p. 5), that it was a part of the scheme to advertise Robert A. Lee as the complete manager and director of these companies; that in truth and in fact said companies were not under his management and direction, but were dominated and controlled by these petitioners, and that in truth and in fact, as the petitioners then and there well knew, the said Robert A. Lee had not been known to the said financial world, but "IN FACT LOANED HIS NAME TO SAID SCHEME FOR \$12.50 PER WEEK." From this averment it can be readily seen the important part played by the securing of the contract between Sherwin and Schwarz on the one hand and Lee on the other, in sustaining this allegation of artifice and scheme to defraud; for that these petitioners testified and it was not disputed that no one other than these petitioners had any knowledge of or possessed a copy of this contract which disclosed his employment at \$12.50 per week until Southworth secured same for the Federal Trade Commission.

It is not intended to be said here, in the absence of a record to support us, that proof of all of the allegations contained in said indictment was furnished by Sherwin and Schwarz to the Federal Trade Commission, and afterwards by that branch of the government transmitted to some other branch that was seeking to prosecute these defendants therein, but we do respectfully assert that all of this information upon which this indictment and the various counts thereof are based, was furnished to the Federal Trade Commission long before an investigation by the grand jury which returned the indictment and long before the convention of that body.

Some of the documents (not all, however) which peti-

tioners furnished to the Federal Trade Commission, were recorded in the public records, and, we may presume, might have been obtained by the Federal Trade Commission through that agency. That is not the question for determination here. It is not a question how they could have gotten the testimony and the documents, but a question of how they actually did get them from these petitioners.

In view of the Federal Trade Commission Act and the powers and duties of its agents thereunder, and the benefits and burdens affecting individuals called upon to give testimony, and in view of the testimony, documentary and otherwise, furnished by these petitioners, can it be said that this government should be permitted to penalize them in a criminal action in which the same questions are involved?

It is the contention of the government, and as was concluded by the trial court (Record p. 162), "there was no suggestion at any time by anybody of a possible claim of, or reliance upon, expected immunity." The government, in substance, contended there was no demand by the petitioners for immunity on the part of these petitioners in the giving of this testimony before the Federal Trade Commission, and no notice given the government by the petitioners as to their intentions so to claim immunity, and they were, therefore, not entitled to it. This, we think, is fairly answered in the opinion of the court in the case of *United States vs. Armour & Company*, 142 Fed. 808, this excerpt from page 821:

"The fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress, by the immunity laws in question, and

by each of them, has taken away the privilege contained in the amendment, and it is conceded in argument that this cannot be done without giving to the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held, in the case of *Counselman vs. Hitchcock*, 142 U. S. 547, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower.

"Now, in my judgment, the immunity law is broader than the privilege given by the Fifth Amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act (immunity) wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act (immunity) gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law, and without any claim on his part."

The principles relative to this immunity "flowing to the witness as a matter of law, are thoroughly discussed in an opinion by the Supreme Court, delivered by Mr. Justice Brown in the case of *Hale vs. Henkel*, 26 Sup. Ct. p. —; 50 Law Ed. 652, in which the court said:

"The extent of this immunity was fully considered by

this court in *Counselman vs. Hitchcock*, *supra*, in which the immunity offered by revised statutes, Section 860, was declared to be insufficient. In consequence of this decision, an Act was passed applicable to testimony before the Intestate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This Act was declared by this court, in *Brown vs. Walker*, 16 Sup. Ct. 644, 40 Law Ed. 819, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional rights to refuse to answer. Instead, the act was passed apparently to meet the declaration of *Counselman vs. Hitchcock*, *supra*, that 'a statutory enactment, to be void, must afford absolute immunity against further prosecution for the offense to which the question relates.' If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith."

Thus, it is observed, that by virtue of the immunity clause in Art. 8835j, an individual giving testimony cannot claim his privilege on account of the same being incriminating as against him, and that the immunity from prosecution thereafter flows as a matter of law. This principle is approved by the Supreme Court in *Nelson vs. U. S.*, in which an immunity statute and the right of a witness thereunder was being discussed, and the *Hale vs. Henkel* case, *supra*, was cited with approval. 26 Sup. Ct. 358; 50 Law Ed. 673.

In *Brown vs. Walker*, opinion by Mr. Justice Brown. 16 Sup. Ct. 644; 40 Law Ed. 819, in which the court was discussing immunity from prosecution on account

of evidence given before the Interstate Commerce Commission, the court said:

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country, although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction; although, as was said by this court in *Ex Parte Garland*, 71 U. S. 333, it extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . Amnesty is defined by the lexicographers to be an act of the Sovereign power granting oblivion, or a general pardon for a past offense . . . and is usually exercised in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."

And the court, further commenting on this question, used the following language:

"Thus, in *State vs. Nowell*, 58 N. H. 314, a statute which provided that a clerk, servant or agent should not be excused from testifying against his principal, but that he should not thereafter be prosecuted for any offense disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion the court observed that 'the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which

he is compelled to disclose; otherwise the statute would be ineffectual! He is to be secured against all liability and future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution, criminally, for any matter in respect to which he may be required to testify. The additional exception becomes absolute when the witness testifies, and he being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself \* \* \* the legal protection of the witness against prosecution for crime disclosed by him is, in law, an equivalent to his legal innocence of the crime disclosed."

In the case of *Heike vs. U. S.* 30 Sup. Ct. 539; 54 Law Ed. 821, in which the court decided that an appeal from an interlocutory order overruling a plea of immunity did not lie until a conviction of the defendant was had, after which time it might be brought up for review, and in discussing the question of immunity said: "We think then that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after the final judgment in the case."

The defendants filed their plea of immunity as set out in page \_\_\_\_ of this brief (Record p. 47), and the testimony in support thereof (Record pp 63 to 192) was heard by the court and jury, the facts being undisputed, should have been sustained by the court.

It is undisputed from the record in this cause that a duly authorized and commissioned officer of the Federal Trade Commission subpoenaed the General Lee Development Interests, of which these petitioners were officers,

to furnish him such official information pertaining to their business. A subpoena legally means a process, to cause a witness to appear and give testimony under a penalty. Necessarily a subpoena means more than the process of the court, because in this instance the Act creating the Federal Trade Commission, authorizes it to subpoena witnesses and compel them to give testimony and furnish information under a penalty. There is no set form for this kind of subpoena. If it is duly issued by the Federal Trade Commission, or its officers, and demands information pertaining to such matters as the Federal Trade Commission may desire to seek information, it is within the contemplation of this act a subpoena. Then, the petitioners were duly and legally subpoenaed in this case. This subpoena petitioners disobeyed.

The act creating the Federal Trade Commission empowered such commission to have and hold hearings, and to compel witnesses to come before it, and empowered it to compel these witnesses to testify and furnish information and produce documentary evidence. Congress had in mind that the Federal Trade Commission would sit at some place convenient for it, and Congress desired to furnish this Commission means by which it could compel witnesses to come before it at its convenience. In the instant case, the duly authorized officer of such Commission, and so acting, was the Commission, saw fit, either for his convenience or to expedite matters, and to force obedience to his subpoena, to take himself, the Commission, to the office of the General Lee Interests, instead of compelling the General Lee Interests and its officers to come to him, and having so taken the Federal Trade Commission to the offices of the General Lee Interests in Fort Worth, he demanded to know why its officers had not complied with his subpoena and furnished the information requested and demanded. (Tr. 64).

There the Federal Trade Commission demanded of the officers of the General Lee Interests why they had not complied with his (the Commission's) subpoena to furnish information requested and demanded, to which the General Lee Interests, speaking through these petitioners, stated that they were not under the supervision of the Federal Trade Commission, and for that reason were not compelled to obey this subpoena and furnish the information requested and demanded. (Tr. 65.) Whereupon, the Federal Trade Commission, dealing fairly with a citizen, advised petitioners that they were under the supervision of the Federal Trade Commission, and were compelled to furnish information and to obey the subpoena which had been directed to and served upon them. (Tr. 66). Petitioners were not convinced of the authority and power of the Federal Trade Commission, and the Federal Trade Commission, further dealing fairly with a citizen, undertook to point out, read and explain its powers and authority and to convince petitioners that they were in error, and must obey the process, requests and demands of the Federal Trade Commission. (Tr. 66). Petitioners still not convinced, told the Federal Trade Commission that their attorneys had advised them that they were not under the control of the Federal Trade Commission, and the Federal Trade Commission, still dealing fairly with a citizen, requested the address of the attorney, and to convince the attorney and petitioners that petitioners were compelled to obey the subpoena of the Commission and furnish the testimony and information requested and demanded, and to that end, met again in their office, when their attorney was present, and again read to petitioners and their attorney the law under which the Federal Trade Commission was then asserting his authority, and explained his power, which permitted him, and authorized him and empowered him to request and demand testimony and information from

petitioners, and to that end explained to the attorney and petitioners that by petitioners' refusing to furnish the information they were committing a crime, and read to the attorney and petitioners in the same connection with his power to demand the information, his power also to penalize petitioners if they refused to comply with his demand and request. Having convinced the attorney of petitioners, the attorney advised petitioners that they were under the supervision of the Federal Trade Commission, and that they were compelled to comply with the demand or request from the Federal Trade Commission, and furnish information, documentary or otherwise, and testify before the Trade Commission, and if they refused that they were guilty of a crime, and could, by the Federal Trade Commission, be punished. (Tr. 65-66; Tr. 122).

We believe our statement that the letter of the Federal Trade Commission directed to the General Lee Intrests, and which they received, (Tr. 64) was a subpoena; and further in this connection, we call this court's attention to the reading of the statute, Section 7937 (Compiled Statute Section 8836-J) in part as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty," etc.

If we are not correct in this being technically a subpoena, we can at least say that the Federal Trade Commission adopted this method of demanding the information, to the end that they might receive it for its same value and worth as if it had been secured by a subpoena; and this requirement in the letter was the choice of the Trade Commission, and it was its method of seeking to enforce its power; and when he called upon petitioners

he had not further armed himself with any process or subpoena, demands of petitioners, not that they comply with a subpoena that he then had, or that they comply with any other process other than the letter which he had directed to them, he asked petitioners why they had not complied with that process, letter, subpoena or lawful request, and furnished the information demanded. (Tr. 65.) This letter was at least a lawful inquiry under the Federal Trade Commission Act, and it called for information to be furnished the Federal Trade Commission in obedience to lawful requirement, and the Federal Trade Commission, speaking through Mr. Southworth, said to petitioners: "If you neglect or refuse to answer this lawful inquiry or produce the documentary evidence in obedience to the lawful requirement of the commission, you have committed a crime and subject to punishment for not less than one thousand nor more than five thousand dollars, or imprisonment for not more than one years, or both." (Tr. 65-66.)

The Circuit Court of Appeals, in affirming this case, says that the plea of immunity is not good, because no subpoena was issued and neither of the defendants were sworn, and none of the statements made by defendants in pursuance of the request or demand of Southworth was under oath. Thereby saying that Southworth was not acting as the Federal Trade Commission, and was not acting within his power and authority when he called upon petitioners and demanded and received the information from, and documentary evidence of these petitioners. The Circuit Court of Appeals by this statement says, that the Federal Trade Commission has no authority to demand or receive information except that it subpoena a witness, and cause the witness in obedience to subpoena, to come before it and testify or produce these documents, and that it cannot receive such information then except that it swear the witness. If the Circuit

Court of Appeals is correct in this, then Southworth, or the Federal Trade Commission, was wrong when it and he stood before petitioners and said that they were compelled to give this testimony under penalty of being punished as criminals.

The Federal Trade Commission, through Mr. Southworth, informed of its authority and powers as it is, well knew that if it pursued the power and authority to demand of any person that he testify before it, and that he furnish it information, that such act by it furnished immunity to the person interrogated and from whom the information was obtained. The same law that gave it the authority to demand the information and receive it, advised it that when it did so, immunity flowed to the man it was seeking the information from by virtue of its own demand, and because of its act it granted immunity to the citizen about the matters it asked him about or got information from him on. **The government would be unfair to its citizens to arm its agents, and permit them to go to this citizen clothed with such authority, and demand information under the penalty of putting him in jail if he refused to give it, then say to him that if he complied with their demand he did not have the benefit of the same law under which they were claiming their authority.**

Mr. Southworth—and thereby the Federal Trade Commission—thought that he and it had the right to go to petitioners and demand this information; he convinced petitioners that he had such a right. Then, in order to deal fairly with the citizen, the government should say to him, "Did you believe that you were compelled to give this information requested and demanded of you by the Federal Trade Commission; if you thought you were compelled to give it, and if you gave it involuntarily to the Federal Trade Commission upon its demand, order, subpoena or other lawful requirement as

the statute prescribes, then you have for your safeguard the statute which was enacted for your benefit; as we take from you the benefit and safeguard of the Fifth Amendment, and we armed ourselves with the law which took from you that safeguard, and demanded and compelled you to give us testimony in violation of that amendment; at the same time, the law which gave us that authority, gave you the right to say that you should not be prosecuted for anything concerning which you had testified and furnished information.

We desire to call the court's attention to what we believe is fair dealing between the government and its citizen:

**"This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but desist; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more."**  
**(U. S. vs. Pardue, 294 Fed. 543.)**

While the facts of the two cases are not exactly sim-

ilar, the discussion by the court comprehends the situation such as we have in this case, and we desire again to quote from the above decision:

"In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the witness stand upon compulsion by the government. Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion, if a witness appears under a subpoena and is placed upon the stand by the government, the fact of compulsion is *prima facie* established, and the burden shifts to the government to show, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege and testified voluntarily." (U. S. vs. Pardue, *Supra*.)

In the instant case the petitioners have undertaken the burden of showing, both that they were not subpoenaed and that they were compelled to testify—at least they were convinced by the Federal Trade Commission that they were compelled to testify, and beyond contradiction this record establishes that they did not testify voluntarily:

The Circuit Court of Appeals in its opinion, adopts, in our judgment, a most unreasonable, unfair and narrow construction of this statute. It says:

"The language of the amnesty or immunity provision, especially when that language is considered in the light of its context, manifests the absence of any intention to grant amnesty or immunity to a

person who furnishes evidence without a subpoena to him having been issued by the Commission."

To establish the narrowness of this, we felt it only necessary to quote to this court the statute:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty."

We ask your patience in this. Congress had in mind that information might be had in other ways than by a subpoena, because it says, "No person shall be excused from attending and testifying," and it does not refer to "under subpoena or other process." And it then says, "or from producing documentary evidence before the commission." It does not, in this instance, say, "Or in obedience to a subpoena or other process." And then it says, "or in obedience to a subpoena of the commission."

Congress did not see fit to prescribe a form for a subpoena, or direct the mode and manner in which subpoenas should be issued and served for either the attendance of the witness or the production of documentary evidence or the acquisition of the same by the Federal Trade Commission, but it did provide "For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." This court will see that in this language, Congress said that the officers of the Federal Trade Commission had the right, of course in a lawful manner and mode, to get information, access to documents and take copies thereof. Then, having in mind

that some obstruction might be met, or an effort might be made to conceal this information, provides, just following the above: "and the commission shall have power to require by subpoena the attendance, and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Thereby showing that the commission had the power and authority to get the information it desired without the issuance of a subpoena, but, if it was necessary, they had the power to compel the witness to give and produce the testimony and documents. Then Congress said: "Any person who shall neglect or refuse to attend a testify (this carries with it the suggestion of answering a subpoena) or to answer any lawful inquiry." If it was intended that a subpoena was necessary to get any information, why should Congress say that a person was guilty of an offense if he failed to answer any lawful inquiry. Further, if a person fails or refuse to testify or produce documentary evidence, "in obedience to the subpoena (of course a subpoena has been issued and served), or to produce documentary evidence in obedience to a lawful requirement of the commission;" then if a subpoena was the only method, why should Congress say that acitizen was guilty of a crime and subject to punishment if he failed to give information or produce documentary evidence in obedience to a lawful requirement?

The Circuit Court of Appeals has said that before a person can be immune he must have been summoned and attended under the compulsion of a subpoena and give testimony under oath. Congress and the law under which this man claims his immunity, did not so limit his rights.

Congress gave the citizen immunity in at least two instances: One, when he obeys a subpoena and testifies or gives documentary evidence; the other, when he answers a lawful inquiry made in obedience to a lawful requirement of the commission. And in this instance the

Federal Trade Commission asserted in its letter or demand, and through its agent Southworth, that it was making a lawful inquiry, and that petitioners must obey this lawful requirement of the commission and give testimony under compulsion, and under penalty for refusing. Yet, the Circuit Court of Appeals in this case, says that the only way a person can become immune is to be summoned, attend under process of the subpoena, and give testimony under oath; thereby saying that the only lawful way by which the Federal Trade Commission could get testimony or documentary evidence, is in response to a subpoena; yet, the Federal Trade Commission itself, through Mr. Southworth, says to petitioners that it had the right to compel them to answer their letter and demand, which they say was an official request, and if petitioners failed to comply with and obey this official request, petitioners were guilty of a crime and might be punished." (Tr. 65.)

The Circuit Court of Appeals in its opinion says: "Evidence furnished in compliance with a request or demand of an examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision." (Tr. 171.)

This is the entire opinion of the Circuit Court of Appeals. These four lines include and comprehend the entire opinion of the court. The rest of the opinion is argument and persuasion, attempting to justify the conclusion reached therein. We can do no better than to again refer the court to the quotation in the case of the United States vs. Pardue, to answer this conclusion; and the United States vs. Armour & Company, 142 Fed. 808, previously referred to and quoted in this brief.

A subpoena serves the purpose only of compelling a witness to come to the tribunal and testify. If this

tribunal sees fit to take itself to the witness and there compel the witness to testify, then a subpoena is useless, and the tribunal has accomplished its purpose without the office of the subpoena; and if the tribunal accomplishes its purpose by a threat or coercion or punishment, the witness has been as much compelled to involuntarily deliver up his testimony and documents as if the tribunal was clothed with all the dignity of a court and its attachees and its processes, and we submit that this record discloses that these petitioners refused to give testimony or produce documents until the tribunal convinced their attorney, and he advised them that they were compelled, under penalty, to testify and deliver documents; and then, and then only, and not until then, did they answer questions or give information.

We have burdened this court at length, but we thought the rights of these petitioners would be protected by the Circuit Court of Appeals; but having been disappointed there, we so deeply feel that these petitioners have been unjustly and unfairly dealt with, that in our eagerness we fear we have trespassed upon your patience.

The Circuit Court of Appeals lightly touches upon the fact that the postoffice inspectors gathered information and presented same to the grand jury, independent of the Federal Trade Commission, and therefore, these petitioners were deprived of the rights given them by the law. This is so idle that we do not argue the same with this court. Congress gave these petitioners immunity when they, under compulsion, gave up their information to the Federal Trade Commission, then they were completely, fully and forever immune from prosecution about any of the things concerning which they testified and furnished information; and when the Federal Government through one agency gets the information, under circumstances which give the petitioners immunity, then another agency

of the same government cannot deprive them of that immunity.

These questions are not new to our courts, and in every instance to which our citations have led us, our appellate courts have held that the question of immunity, based upon and growing out of the Fifth Amendment, is one sacred to the preservation of the rights of our citizenship. To say that Congress meant to take away from a citizen a valid right and give nothing in return is but idle talk. So that, Congress, under Art. 8836, in taking away the right of a citizen to claim his privilege from testifying, gave and intended to give him absolute immunity from the prosecution of any transaction, matter or thing about which he had previously testified under the conditions set forth therein. There is nothing left of our vaunted civilization if an absolute right of a defendant, given him by law, is not recognized when invoked by him. The law has no surer champion than the man who feels that he has had the benefit of all its provisions, even though he is ultimately stricken by it; but when one feels its penalties and its rigors without the privilege of enjoying its safeguards and its fairness, he despairs.

Petitioners request that their petition for certiorari be allowed, and that upon hearing this cause be reversed and dismissed.

Respectfully submitted,

M B Scott

Fort, Worth, Texas.  
Attorneys for Petitioners.

# INDEX.

Page

## Argument on the Brief:

(We have presented to the court all of the specifications of error together as the specifications reflect only one question, that of immunity, and we have presented what we believe an error in failing to sustain the plea and the error of the court in refusing the special charges thereon).... 4-8

Statement of the Case and Result.....1-2-3-4

## Specifications of Error:

First..... 4-5

Second..... 5-6

Third..... 6-7

Fourth..... 7-8

Agreement as to Certain Evidence.....19-20

Argument in Support of Specification of Errors.....8-39

## LIST OF AUTHORITIES.

*Brown vs. Walker*, 16 Sup. Ct., 644; 40 L. Ed., 819..24-25

Comp. St. Sec. 8836F.....8-9, 16-18-22

8836I.....8-9, 16-18-34

8836J.....8-9, 16-18-24-29

*Counselman vs. Hitchcock*, 142 U. S., 547..... 23

*Ex Parte Garland*, 71 U. S., 333..... 25

*Hale vs. Henkel*, 50 L. Ed., 652.....24-25

*Heike vs. U. S.*, 30 Sup. Ct., 539; 54 L. Ed., 821..... 26

*Nelson vs. U. S.*, 26 Sup. Ct., 358; 50 L. Ed., 673.... 24

*State vs. Nowell*, 58 N. H., 314.....25-26

*U. S. vs. Armour & Co.*, 142 Fed., 808.....16-17-22-23-37

*U. S. vs. Pardue*, 294 Fed., 543.....32-33-37

*U. S. vs. Sanborn*, 28 Fed., 299..... 17



IN THE  
**Supreme Court of the United States**

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**No. 379.**

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**CHARLES SHERWIN AND HARRY H. SCHWARZ,  
PETITIONERS,**

*vs.*

**THE UNITED STATES OF AMERICA,  
RESPONDENT.**

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**Brief For Petitioners, Charles Sherwin and  
Harry H. Schwarz, Upon Final Hearing.**

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**Statement of Nature and Result of Case.**

(For brevity purposes, Charles Sherwin and Harry H. Schwarz, will be called "Petitioners" and the Government will be called "Respondent.")

Indictment was filed on the 12th day of March, 1923, against Petitioners, and one R. A. Lee, jointly, which indictment contained six counts, the first five counts charging a violation of Section 215 of the Criminal Code of the United States and the sixth count charging a violation of Section 37 thereof, and is fully set out in Transcript of Record, pages 1 to 22, inclusive.

Petitioners pled not guilty, and in connection therewith filed their plea of immunity (Transcript, pages 27 to 30, inclusive), alleging in substance that they were immune from prosecution under the Immunity Law, commonly referred to as the Federal Trade Commission Act, as contained in Articles 8836, and the alphabetical

subdivisions thereof, inasmuch as Petitioners had furnished to John F. Southworth, authorized agent and examiner of the Federal Trade Commission under compulsion, oral testimony, books, documents, contracts, and letters of and concerning the affairs, conditions, operations, control and management of the three oil companies which Petitioners were operating under declaration of trust, known as "General Lee Development Interest; General Lee Interest No. 1, and General Lee Interest No. 2," and upon the operations of which said companies the indictment was predicated; that the oral and documentary testimony was furnished to John F. Southworth, agent of the Federal Trade Commission, by reason of a command in writing (Transcript, page 36), and telegrams addressed to Petitioners and their company (Transcript, page 38), together with numerous threats and demands in person by Southworth, and after he had read the immunity law to these Petitioners, and demanded that they furnish such testimony, or else subject themselves to the penalty of imprisonment and fine, either or both (Transcript, pages 37-8), Petitioners further alleging in said plea of immunity that said testimony was furnished to the Federal Trade Commission long prior to any investigation of them or their companies having been made by a post office inspector, or the grand jury returning said indictment, and that the evidence, both oral and documentary, which they furnished said Southworth, was and is the basis of the indictment against them.

Respondent filed a reply to said plea of immunity (Transcript, page 30), and the testimony of Petitioners, having been introduced respecting said appeal (Transcript, pages 35, 36, 37, 38 and 69), and all of the evidence pertaining to the case on its merits having been adduced, the court instructed the jury, over the exception of the Petitioners, to return a verdict against Petitioners

upon their plea of immunity (Transcript, page 74), and the jury returned a verdict in accordance with said instructions and found the Petitioners guilty on each of the six counts of said indictment, and the court thereupon sentenced them in a penal sum and confinement in the penitentiary. (Transcript, pages 33-34.)

By Writ of Error the cause was carried to the United States Circuit Court of Appeals for the Fifth Circuit, and upon hearing in said court, said cause was affirmed (Transcript, pages 89 to 94, inclusive).

Thereafter, and in proper time, motion for rehearing was filed (Transcript, page 95), and by said Circuit Court of Appeals overruled. (Transcript, page 103.)

A petition for a Writ of Certiorari having been presented to this honorable court, the same was granted on June 9, 1924.

In the trial court, and in the Circuit Court of Appeals various assignments of error were brought forth (Transcript, pages 76 to 79, inclusive), many of which have been, by the Petitioners, abandoned, so that we are before this court with but a single assignment of error and proposition of law, and that is, whether or not these Petitioners, by reason of their having complied with the demands of Southworth, as agent for the Federal Trade Commission, in furnishing certain testimony can be subsequently prosecuted for a transaction or matter about which they had previously given such testimony and evidence.

(Petitioners, in connection with their application for a Writ of Certiorari, and under the same cover therewith, filed in this court an extended brief and argument on the question here involved, which they do not abandon, but here adopt as part of this brief and argument, and the object of this brief and argument upon this hearing is to get concisely before the court the assign-

ments of error and propositions of law germane to the case.)

Petitioners made their assignment of errors in the nature of complaints of the action of the trial court, as is fully shown at pages 76, 77 and 78 of the Transcript; and specify the errors relied upon, as follows:

### **SPECIFICATIONS OF ERRORS.**

#### **1.**

The trial court erred in overruling, and in not sustaining Petitioners' plea of immunity in the nature of a plea in abatement, for each and every reason therein assigned, and in failing to instruct the jury to return a verdict of not guilty, as requested by a motion and in a special charge; (Assignment of Errors Nos. 2 and 4; Tr. 76-77) and the Circuit Court of Appeals erred in affirming said action of the trial court, because it was not denied by the government, and the record conclusively established that Petitioners were summoned (or subpoenaed) by the Federal Trade Commission to, and they did, answer a lawful inquiry of the Federal Trade Commission, and there was demand of them by the Federal Trade Commission, and they were compelled by the Federal Trade Commission, under threat, to produce documentary evidence, and they did produce the same, in obedience to the summon (or subpoena) or lawful requirement of the Commission, and the evidence given, information furnished and documents produced were concerning the matters and things about which they were later indicted in this case. Immunity flowed to these Petitioners by virtue of the statute, and they should not have been prosecuted or subject to any penalty or forfeiture for,

or on account of, any transaction, matter or thing about which they testified or produced evidence.

The statute gives the Federal Trade Commission power and authority to demand and compel the production, by subpoena, or by lawful requirement, or by lawful inquiry, evidence, documentary or otherwise, and a person is not excused from giving or furnishing this evidence for the reason that it might tend to incriminate him. If the Federal Trade Commission, by subpoena, or without subpoena but by lawful requirement, demands and receives such evidence, the person so called upon, who furnishes the same, is immune from prosecution for, or on account of any of the transactions, matters or things about which he testifies or produces such evidence. The demand for and compelling the production of, and the receiving of the evidence, documentary or otherwise, or the mere acquisition of evidence, documentary or otherwise, by the Federal Trade Commission, through subpoena or lawful requirement of the commission, within itself gives immunity to the person for or on account of any of the matters and things about which he may testify or furnish evidence.

2.

The trial court erred in peremptorily instructing the jury to return a verdict against Petitioners on the issue of their plea of immunity (Assignment No. 3; Tr. 77) and in charging the jury in substance that the plea of immunity was a question of law, and that he, the court, would instruct the jury to return a verdict for the government and against Petitioners on that issue. (Tr. 74.)

And the Circuit Court of Appeals erred in affirming the action of the trial court, because the record discloses, without contradiction, that the Federal Trade Commission, through Mr. Southworth, demanded of Petitioners, and compelled them, through fear of penalties of the law, to answer a questionnaire, and furnish evidence, documentary and otherwise, to the Federal Trade Commission, and said evidence furnished, and the answers so made, were about and concerning the matters for which they were later indicted, and were then about to be tried. The statute grants immunity from the penalties or forfeitures for, or on account of the transaction, matters or things concerning which they testify or produce evidence to the Federal Trade Commission in response to a subpoena or lawful inquiry, or in obedience to a lawful inquiry, or in obedience to a lawful requirement and the court should not have peremptorily instructed the jury to return a verdict in favor of the government and against Petitioners on their plea of immunity.

## 3.

The trial court erred in refusing to instruct the jury in appropriate language, and in terms of the law, as to the rights of Petitioners with respect to the issue of immunity as raised by their plea of immunity, and the evidence concerning same, as was set out in the special charges heretofore copied in this petition (Assignment of Error No. 5; Tr. 77-78-79), because the statute gave Petitioners immunity from penalties and forfeiture for, or on account of any transactions, matters and things concerning which they might testify or produce evidence documentary or otherwise

before the Federal Trade Commission. The Petitioners made their plea and claim of immunity in writing before the court, and later before the court and jury; they introduced evidence thereon, and same presented a question of fact and the court should have given Petitioners' requested charges as the same properly presented the law applicable to the issues.

## 4.

The Circuit Court of Appeals erred in its opinion, wherein it said, "The evidence furnished in compliance with a request or demand by an examiner of the commission, without the issuance of a subpoena, is not, within the terms of the provision of the statute," because this is in our opinion an incorrect interpretation or application of the law. Immunity is given persons who appear before the Federal Trade Commission and testify under oath, or furnish evidence, documentary or otherwise, or who furnish evidence without regard to subpoena or oath to the Federal Trade Commission in answer to any lawful inquiry of the Federal Trade Commission, or who furnish evidence, documentary or otherwise, with regard to subpoena or oath, to the Federal Trade Commission, in obedience to a lawful requirement of the commission. The Circuit Court of Appeals says that the test as to whether immunity flows or not is—did the subpoena issue? Did the witness appear in obedience to the subpoena and testify under oath. The statute says a person can be punished who fails or refuses to attend and testify, or answer a lawful inquiry, or produce documentary evidence (1) in obedience

to a subpoena, (2) in obedience to any lawful requirement of the commission. If a person answers any lawful inquiry without a subpoena, or testifies, or produces documentary evidence, either in obedience to a subpoena or in obedience to a lawful requirement of the commission, he should be equally immune from penalties or forfeiture for or on account of any transactions, matters or things concerning which he may testify or produce evidence. (Pages 89-94.)

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### **BRIEF AND ARGUMENT.**

Article 8836, as enacted in 1914 and 1916, having to do with the Federal Trade Commission and those coming under its jurisdiction, not only creates the commission but defines its functions and authority, among which it is empowered to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of any corporation, joint stock association or partnership other than banks and common carriers, and their relations to other corporations, associations and partnerships. (Art. 8836-f.) This article further empowers the commission **OR ITS DULY AUTHORIZED AGENTS**, to require the attendance and testimony of witnesses and the production of documentary evidence by said witness, relating to any matter under investigation (Art. 8836-l), and it is made an offense on the part of the individuals having such information to "neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena, or **LAWFUL REQUIREMENT OF THE COMMISSION**," and a failure to so comply with such lawful requirement (Art. 8836-j)

carries with it the imposition of a penalty of not less than \$1,000 nor more than \$5,000 or by imprisonment for not more than one year or by both such fine and imprisonment.

Unless immunity be granted to the person so testifying and furnishing documentary evidence, and meeting the other **LAWFUL REQUIREMENTS OF SAID COMMISSION** it would be in direct violation of the Fifth Amendment to the Constitution of the United States, and to meet this provision of the Constitution, Art. 8836-i provides, "no person shall be excused from attending and testifying, or from **PRODUCING DOCUMENTARY EVIDENCE BEFORE THE COMMISSION** or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him might tend to criminate him or subject him to be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, before the Commission in obedience to a subpoena issued by it."

Thus we find a statute whereby the Federal Trade Commission in the furtherance of an investigation may require any individual to give testimony and furnish documentary evidence concerning a matter under investigation by said Commission, and when such testimony is given, the individuals giving the same are immune from prosecutions about any transactions, matter or thing concerning which he had previously testified or furnished documentary evidence. (Art. 8836.)

Sherwin and Schwarz were engaged in the oil business, the drilling of wells and selling of stock; they had organized three companies, to wit, General Lee Interests No.

One, General Lee Interests No. Two, and General Lee Development Interests as evidenced by their three respective declarations of trust (Rec., pp. 39-54), and Sherwin and Schwarz were officers of each of these joint stock associations, were drilling oil wells, purchasing mineral leases and selling stock in each of the said companies. (Rec., p. 39.) These Petitioners had employed Robert A. Lee in whose name the companies were organized and operated (Rec., pp. —), and these Petitioners were to pay Robert A. Lee the sum of \$50 per month and 10 per cent of the profits of said company.

These petitioners had secured drilling contracts and had a list of all of the purchasers of stock in either or all of their companies, and all of these matters or at least a greater portion thereof, were known only to these Petitioners, and the documentary evidence was possessed only by them. (Rec., p. 59.)

The Federal Trade Commission was making an investigation of various oil companies, and acting through Otis B. Johnson, its Secretary, the Federal Trade Commission mailed to Petitioners, which was by them duly received, a letter demanding all of the information and facts possessed by these Petitioners concerning the operation of these three companies (Rec., p. 36) which letter is as follows:

"Washington, July 30, 1922, General Lee Development Interests, Edwards Building, Forth Worth, Texas, Sirs: **This Commission officially requests** that under sections 5, 6, 9 and 10 of the Federal Trade Commission Act that you report to it and furnish at once information called for by the annexed schedule. As to any portion thereof which you can not answer immediately, please supplement your first statement within seven days upon receipt of this letter. The Commission will consider application for an extension of time to answer any specific question for good cause shown. **Your attention is respectfully**

called to the penalties provided in Section 10 of the Federal Trade Commission Act (last page of Schedule A herewith enclosed) for any failure, refusal, delay or falsification of, or in any report made in answer to this Commission's lawful inquiry.

"This Commission is charged with the duty of preventing unfair methods of competition and with the investigation of corporations and it may make public so much of the information it obtains as it may deem in the public interest. It is believed that the small inconvenience of filing this information which we now request will be borne cheerfully in general because of the benefit which will accrue to the public and because of its interest therein. Very truly yours, Federal Trade Commission. Otis B. Johnson, Acting Secretary."

Petitioners refused to give the testimony and information requested in said letter. Later on, John F. Southworth, agent of the Federal Trade Commission, called at the office of the General Lee Company, which was in charge of these Petitioners (Rec., p. 37) and demanded that Petitioners furnish such information. Petitioners replied that they did not have to furnish him with the information. Thereafter these Petitioners complied with said demand and furnished the information, gave the testimony, answered the questions and furnished documentary evidence, as shown by the testimony of Petitioner, Sherwin, beginning (Rec., pp. 35, 36, 37, also 59 to 69, inc.).

"Southworth then said, we did come under the jurisdiction of the Federal Trade Commission and that by not answering the questionnaire sent to us, we were committing a crime subject to a penalty of imprisonment and fine, either or both. (Rec., p. 37.) I told

him I had consulted my attorney, Mr. Turner, at that time, who advised me that we did not come under the jurisdiction of said Federal Trade Commission, and that we did not have to fill out or file any questionnaire sent to me, by the Federal Trade Commission. (Rec., p. 37.) Mr. Southworth then asked me for the address of my attorney and I gave it to him. He again told me we were committing a crime (Rec., p. 37), and that he would take the matter up with Mr. Turner and convince him that we were committing a crime by not answering questions, and said he would show him a copy of the law. (Rec., p. 37.) Southworth had an appointment with Mr. Turner and they met in our office, and read the law to Mr. Turner, Mr. Schwarz and myself, after which Mr. Turner then advised me that in accordance with that law we were committing a crime by not answering the questions. (Rec., p. 37.) We then gave him (Southworth) everything that he demanded, the declarations of trust, copies of contracts, copies of leases, showed the record of our books, gave him a list of the stockholders and some correspondence we had on some of them. (Rec., p. 37.) We let him read that and make notes as he went along, and had copies made for him of any document that he demanded. We had contracts between Mr. Lee, Mr. Schwarz and myself, and Mr. Southworth demanded them and we gave them to him (Rec., p. 37); in fact, we surrendered to him everything that he demanded. The documents that we surrendered to him were from our files and office. The contracts were all typewritten, the leases were partly typewritten and partly on forms filled in. He got the names of our stockholders from our stock ledger. The stock ledger was furnished him by Mr. Schwarz. We were both present all of the time, and acted together in furnishing Southworth this information. (Rec., p. 37.)

"This gentleman (Mr. Southworth) came to our office a half dozen times before we gave him any information. (Rec., p. 37.) After we began furnishing him with documentary evidence and information, he came to our office about twenty times. When he left our office and this city, he left with these documents in his possession. After Southworth left the city we received communications from him by telegram. The four documents you now hand me are the two telegrams received from Southworth by us, and of my two replies thereto, and they are marked Exhibits 4, 5, 6 and 7 (the exhibits were offered and admitted in evidence) and are as follows:

"No. 4. October 27, Eldorado, Arkansas, Charles Sherwin, care General Lee Development Interests, Edwards Building, Fort Worth, Texas. Advise if lists sent Garrett Hotel, Eldorado, not received. Southworth."

"No. 5. Fort Worth, Texas, October 27, 1922. John F. Southworth, Garrett Hotel, Eldorado, Arkansas. Sherwin out of town. Advise how long you will be there. Will wire you later. Regards. H. H. Schwarz."

"No. 6. November 8th, Kansas City, Missouri, General Lee Development Interests, Edwards Building, Fort Worth, Texas. Has list been sent. Leave Kansas City tonight. Wire general delivery. Southworth."

"No. 7. November 8, 1922. John F. Southworth, General Delivery, Kansas City, Missouri. List mailed last night. Regards. Charles Sherwin." (Rec., p. 38.)

These petitioners further testified in substance (Rec., p. —) that they refused to give Mr. Southworth any of the information, testimony or documents that he was

seeking for the Federal Trade Commission, and as agent thereof, until they were convinced that it was their duty, by virtue of Art. 8836 and the subdivisions thereof, to furnish the same; that Southworth presented and read this law to them, and in effect threatened them with prosecution unless they did surrender this evidence and these documents. Further testifying, these Petitioners said (Rec., p. 39): "I never did make at any time, or intend to make any statement that I had waived any rights which the laws of the land gave me," and furthering testifying, Petitioners said (Rec., p. 39):

"No one had a list of our stockholders, save and except us (Sherwin, Schwarz and Lee), and our companies (Rec., p. 59), and no one had a copy of the contract between Mr. Schwarz and myself on the one hand and Mr. Lee on the other; that document was not recorded. (Rec., p. 59.) He, Southworth, inquired into the date of incorporation and we answered every question and he put down the answers to each and every question on the questionnaire. I believe there are fifty questions on that questionnaire. We answered these questions at the demand of Mr. John F. Southworth. (Rec., p. 59.) . . . He (Southworth) reported himself to be an agent of the Federal Trade Commission. (Rec., p. 36.) . . . When he called upon us and made himself and his official position known, he wanted to know why we had not answered the questionnaire sent us from Washington" (Rec., p. 37).

Further testifying with respect to the character of the testimony, information and documents furnished the Petitioners said (Rec., p. 60).

"In addition to this, I gave Southworth the address of the largest stockholders we had at that time. We let

him make notes from correspondence which he wanted to read, and this correspondence related to the purchase of interests of some of our stockholders who had already purchased stock. (Rec., p. 60.) In some instances the letters would be complaints made and I showed Southworth how we adjusted that complaint or replied to it. **We not only showed him letters which related to matters that had been satisfactorily adjusted, but we showed Southworth other letters in which complaints were made that had not been adjusted. He specifically called for those letters. (Rec., p. 60.)** . . . He did not mention the name of the stockholders who had specifically complained, but he wanted letters containing complaints, if any, we had at that time." (Rec., p. 60.)

The questionnaire contained some fifty questions with subdivisions thereunder, which sought every character of imaginable information respecting the organization and operation of the three companies in which these Petitioners were interested, were fully answered by these Petitioners to Southworth, and it gave to the Federal Trade Commission, through Southworth as their agent, every conceivable bit of knowledge which these Petitioners possessed without an exception, including the taking of the said John Southworth out to the field upon the lease where the well was being drilled, and there explaining to him in detail the physical property and their mode of operation. The questions and answers to the questionnaire fully disclosed all the methods employed by these Petitioners, both private and public. (Rec., pp. 59 to 68, inclusive.)

It was established beyond any peradventure of a doubt, and was uncontradicted that John F. Southworth was and is the authorized agent of the Federal Trade Commission, such as is mentioned in Article 8336, not only

by the documents and the testimony of the defendants, but by the government's witness J. S. Swinson, who testified that he was a post office inspector, and that

"I know John F. Southworth (Rec., p. 70). I met him last fall . . . As near as I can get at it, his business is to procure information for the Federal Trade Commission of the United States Government. I think his title is Special Examiner Federal Trade Commission."

Article 8836 provides, "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense, etc." It will thus be observed that these petitioners at first refused to give this testimony, notwithstanding the letter from Johnson, the Acting Secretary of the Federal Trade Commission and notwithstanding the five or six visits of Southworth to their office, and his appeals to them personally demanding said information, and only gave said testimony upon being convinced that under Article 8836 they were not permitted to refuse to give same FOR ANY REASON and after this law was read to them, and explained, both by Southworth and attorney for these Petitioners to have that effect.

It is true no subpoena was issued, but inasmuch as the witness was present before Southworth, it was unnecessary that a subpoena should issue. This question is fairly discussed and that principle clearly announced in the case of the United States *vs.* Armour & Company, 142 Fed., 808, in which case the court was discussing a similar question arising under a similar statute, granting immunity, known as the Interstate Com-

merce Act, which was enacted February 11, 1893, in which the court said:

"But it is insisted by the government that they had not given under compulsion because they did not give under what is known in law as a testimonial compulsion, and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. . . . The subpoena is not necessary where the person is present in court or within the verge of the court. The only object of the subpoena is to secure the attendance. It is superfluous when he is present, without subpoena (*United States vs. Sanborn*, 28 Fed., 299, at p. 302). . . . I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpoena is a useless and superfluous thing after the tribunal and witness are together. And I am also of opinion that under these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admission against interest and against the party producing them."

And while no oath was administered, yet from the sound reasoning set forth in the *Armour* case, *supra*, that neither a subpoena to require attendance nor oath for the giving of testimony was used, that neither was necessary, and that said proceedings and the testimony given at such hearing amounted to the same as a matter of law as if the subpoena had actually been issued and the oath administered. In any legal proceeding a defendant may waive the issuance of a subpoena and present himself in court and obtain the same protection as if actually subpoenaed, and likewise the government may waive the administering of the oath to a

witness, in either of which events the result of their having come in contact with each other for designated purposes would be the same.

It is apparent from the reading of Article 8836-j that the subpoena and oath each might be dispensed with, for that an individual is penalized not only for refusing to attend and testify, but "OR TO ANSWER ANY LAWFUL INQUIRY OR TO PRODUCE DOCUMENTARY EVIDENCE," and while this is subsequently said to be in obedience to a subpoena, it also says, "OR LAWFUL REQUIREMENT OF THE COMMISSION," and certainly without dispute it must be said that Southworth had required these defendants "to answer any lawful inquiry" in obedience to a "lawful requirement of the Commission." And if he choose to waive the swearing of the witness on behalf of the government, the government ought not to be permitted to take advantage of it at any time thereafter.

The hearings by the Federal Trade Commission had before its agent, John F. Southworth, in which these Petitioners furnished the testimony and documents aforesaid, was had beginning June 30, 1922 (Rec., pp. 36-37), and before the convention of the grand jury at which this indictment was returned, and before the convention of the grand jury which was March 12, 1923 (Rec., p. 1), and necessarily before the date of this trial.

The indictment and the several counts therein contained discloses that the alleged offenses set forth therein were based upon the transactions, matters and things concerning which the Petitioners had previously testified and produced evidence, documentary and otherwise, before the Federal Trade Commission, and upon these charges these petitioners were subsequently

convicted (Rec., p. 32); in fact, some of the identical documents and contracts, or at least copies thereof, which petitioners testified they furnished to the Federal Trade Commission, and in which in some instances no one except these defendants had knowledge or copies until the same was furnished to John F. Southworth, was introduced as evidence against these Petitioners upon the trial of this cause, on its merits, and was a part of the evidence used in securing their conviction. About this, the government can make no contention, because it is an agreement contained in the record respecting the same, which is as follows (Rec., pp. 71 and 72):

"That the government's exhibits one, two and three, the same being the declaration of trust of the General Lee Interests No. One, General Lee Interests No. Two and the General Lee Development Interests, respectively (which are copied herein), were introduced by the government in the trial of this case on its merits; that identical copies of each of these documents are the same ones which the defendants Sherwin and Schwarz testified that they gave to John F. Southworth, agent of the Federal Trade Commission, and that each of these documents were recorded in the deed records of Tarrant County, at the time the copies thereof were furnished. That the government exhibit No. , the same being a contract between the General Lee Development Interests, through its trustees as first parties, and Sherwin, Schwarz and Lebenson, as second parties, of date April 12th, 1922, and the same containing a copy of the agreement by and between R. A. Lee and Sherwin and Schwarz, concerning the compensation of the said Robert A. Lee for his services in said company (a copy

of which contract is contained herein) is the same and identical contract of which the defendants Schwarz and Sherwin testified they gave copies to John F. Southworth, and that said contracts were not of record, and that this last mentioned exhibit was introduced by the government in the trial of this case on its merits."

This alone, we think, is sufficient to show that the inquiry of the government as to the acts of the Petitioners upon the trial of this case involved the same identical questions as were involved and inquired into and about by the Federal Trade Commission agent, John F. Southworth, when these Petitioners were before him as a tribunal many months before any criminal investigation, such as finally culminated in the conviction of these Petitioners, was given; but this is not all, in fact, is but a small part of the transactions, matters and things inquired about by the court in the trial upon the merits, but this can only be reflected by this tribunal, in the absence of a full statement of facts, by a reference to the allegations in the various counts of the indictment herein, the proof of which was necessary to a conviction.

It will be noted the first count of the indictment (Rec., p. 2), in which the conspiracy, scheme and intent to defraud and artifice to obtain money and property by false pretenses, etc., refers exclusively to these petitioners' organization and promotion and sale of shares of stock in three oil companies named therein, to wit: General Lee Interests No. One, General Lee Interests No. Two, and the General Lee Development Interests (Rec., p. —), in the form of trust estate for the pretended purpose of engaging in the pro-

duction and sale of oil and leases for profit, all of which information as to the methods, management and operation thereof was secured from these defendants by the Federal Trade Commission. (Rec., p. 37.)

It is further shown in said indictment and in count one (Rec., p. 4), that it was a part of the scheme to advertise Robert A. Lee as the complete manager and director of these companies; that in truth and in fact said companies were not under his management and direction, but were dominated and controlled by these Petitioners, and that in truth and in fact, as the Petitioners then and there well knew, the said Robert A. Lee had not been known to the said financial world, but "IN FACT LOANED HIS NAME TO SAID SCHEME FOR \$12.50 PER WEEK." From this averment it can be readily seen the important part played by the securing of the contract between Sherwin and Schwarz on the one hand and Lee on the other, in sustaining this allegation of artifice and scheme to defraud; for that these Petitioners testified and it was not disputed that no one other than these Petitioners had any knowledge of, or possessed a copy of this contract which disclosed his employment at \$12.50 per week until Southworth secured same for the Federal Trade Commission. (Rec., p. 59.)

It is not intended to be said here, in the absence of a record to support us, that proof of all of the allegations contained in said indictment was furnished by Sherwin and Schwarz to the Federal Trade Commission, and afterwards by that branch of the government transmitted to some other branch that was seeking to prosecute these defendants therein, but we do respectfully assert that all of this information upon which this indictment and the various counts thereof are based, was furnished to the Federal Trade Commission long

before an investigation by the grand jury which returned the indictment and long before the convention of that body. (Rec., p. 38.)

Some of the documents (not all, however) which Petitioners furnished to the Federal Trade Commission, were recorded in the public records, and, we may presume, might have been obtained by the Federal Trade Commission through that agency. That is not the question for determination here. It is not a question how they could have gotten the testimony and the documents, but a question of how they actually did get them from these Petitioners. (Art. 8836.)

In view of the Federal Trade Commission Act and the powers and duties of its agents thereunder, and the benefits and burdens affecting individuals called upon to give testimony, and in view of the testimony, documentary and otherwise, furnished by these petitioners, can it be said that this government should be permitted to penalize them in a criminal action in which the same questions are involved?

It is the contention of the government, and as was concluded by the trial court (Rec., pp. 82-87), "there was no suggestion at any time by anybody of a possible claim of, or reliance upon, expected immunity." The government, in substance, contended there was no demand by the Petitioners for immunity on the part of these Petitioners in the giving of this testimony before the Federal Trade Commission, and no notice given the government by the Petitioners as to their intentions so to claim immunity, and they were, therefore, not entitled to it. This, we think, is fairly answered in the opinion of the court in the case of *United States vs. Armour & Company*, 142 Fed., 808, this excerpt from page 821:

"The fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress, by the immunity laws in question, and by each of them, has taken away the privilege contained in the amendment, and it is conceded in argument that this can not be done without giving to the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held, in the case of *Counselman vs. Hitchcock*, 142 U. S., 547, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower. (142 Fed., 808.)

"Now, in my judgment, the immunity law is broader than the privilege given by the Fifth Amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act (immunity) wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act (immunity) gives immunity for evidence of, or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law, and without any claim on his part." (142 Fed., 808.)

The principles relative to this immunity "flowing to the witness as a matter of law, are thoroughly discussed in an opinion by this court, delivered by Mr. Justice Brown in the case of *Hale vs. Henkel*, 26 Sup. Ct. p. —; 50 Law Ed., 652, in which the court said:

"The extent of this immunity was fully considered by this court in *Counselman vs. Hitchcock*, *supra*, in which the immunity offered by revised statutes, Section 860, was declared to be insufficient. In consequence of this decision, an Act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This Act was declared by this court, in *Brown vs. Walker*, 16 Sup. Ct., 644, 40 Law Ed., 819, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional rights to refuse to answer. Instead, the act was passed apparently to meet the delation of *Counselman vs. Hitchcock*, *supra*, that 'a statutory enactment, to be void, must afford absolute immunity against further prosecution for the offense to which the question relates.' If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith."

Thus, it is observed, that by virtue of the immunity clause in Art. 8835j, an individual giving testimony can not claim his privilege on account of the same being incriminating as against him, and that the immunity from prosecution thereafter flows as a matter of law. This principle is approved by this court in *Nelson vs. U. S.*, in which an immunity statute and the right

of a witness thereunder was being discussed, and the *Hale vs. Henkel* case, *supra*, was cited with approval. 26 Sup. Ct., 358; 50 Law Ed., 673.

In *Brown vs. Walker*, opinion by Mr. Justice Brown, 16 Sup. Ct., 644; 40 Law Ed., 819, in which the court was discussing immunity from prosecution on account of evidence given before the Interstate Commerce Commission, the court said:

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country, although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction; although, as was said by this court in *Ex Parte Garland*, 71 U. S., 333, it extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . Amnesty is defined by the lexicographers to be an act of the Sovereign power granting oblivion, or a general pardon for a past offense. . . . and is usually exercised in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."

And this court, further commenting on this question, used the following language:

"Thus, in *State vs. Nowell*, 58 N. H., 314, a statute which provided that a clerk, servant or agent should not be excused from testifying against his principal, but that he should not thereafter be prosecuted for any offense

disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion the court observed that "the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise the statute would be ineffectual! He is to be secured against all liability and future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution, criminally, for any matter in respect to which he may be required to testify. The additional exception becomes absolute when the witness testifies, and he being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself . . . the legal protection of the witness against prosecution for crime disclosed by him is, in law, an equivalent to his legal innocence of the crime disclosed."

In the case of *Heike vs. U. S.*, 30 Sup. Ct., 539; 54 Law Ed., 821, in which the court decided that an appeal from an interlocutory order overruling a plea of immunity did not lie until a conviction of the defendant was had, after which time it might be brought up for review, and in discussing the question of immunity said: "We think then that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after the final judgment in the case."

The Petitioners filed their plea of immunity. (Rec., p. 27.) The testimony in support thereof (Rec., pp. 35

to 71) was heard by the court and jury, the facts being undisputed, should have been sustained by the court.

It is undisputed from the record in this cause that a duly authorized and commissioned officer of the Federal Trade Commission subpoenaed the General Lee Development Interests, of which these Petitioners were officers, to furnish him such official information pertaining to their business. (Rec., p. 36.) A subpoena legally means a process, to cause a witness to appear and give testimony under a penalty. Necessarily a subpoena means more than the process of the court, because in this instance the Act creating the Federal Trade Commission, authorizes it to subpoena witnesses and compel them to give testimony and furnish information under a penalty. There is no set form for this kind of subpoena. If it is duly issued by the Federal Trade Commission, or its officers, and demands information pertaining to such matters as the Federal Trade Commission may desire to seek information, it is, with the contemplation of this act, a subpoena. Then, the Petitioners were duly and legally subpoenaed in this case. This subpoena Petitioners obeyed.

The Act creating the Federal Trade Commission empowered such commission to have and hold hearings, and to compel witnesses to come before it, and empowered it to compel these witnesses to testify and furnish information and produce documentary evidence. Congress had in mind that the Federal Trade Commission would sit at some place convenient for it, and Congress desired to furnish this Commission means by which it could compel witnesses to come before it at its convenience. In the instant case, the duly authorized officer of such Commission, and so acting, was the Commission, saw fit, either for his convenience or to expedite matters, and to force obedience to his subpoena, to take himself, the Commission, to the office of the General Lee Inter-

ests, instead of compelling the General Lee Interests and its officers to come to him, and having so taken the Federal Trade Commission to the offices of the General Lee Interests in Fort Worth, he demanded to know why its officers had not complied with his subpoena and furnished the information requested and demanded. (Tr. 37.)

There the Federal Trade Commission demanded of the officers of the General Lee Interests why they had not complied with his (the Commission's) subpoena to furnish information requested and demanded, to which the General Lee Interests, speaking through these Petitioners, stated that they were not under the supervision of the Federal Trade Commission, and for that reason were not compelled to obey this subpoena and furnish the information requested and demanded. (Tr. 37.) Whereupon, the Federal Trade Commission, dealing fairly with a citizen, advised Petitioners that they were under the supervision of the Federal Trade Commission, and were compelled to furnish information and to obey the subpoena, which had been directed to and served upon them (Tr. 37.) Petitioners were not convinced of the authority and power of the Federal Trade Commission, and the Federal Trade Commission, further dealing fairly with a citizen, undertook to point out, read and explain its powers and authority and to convince Petitioners that they were in error, and must obey the process, requests and demands of the Federal Trade Commission. (Tr. —.) Petitioners still not convinced, told the Federal Trade Commission that their attorneys had advised them that they were not under the control of the Federal Trade Commission, and the Federal Trade Commission, still dealing fairly with a citizen, requested the address of the attorney, and to convince the attorney and Petitioners that Petitioners were compelled to obey the subpoena of the Commission and furnish the testimony and infor-

mation requested and demanded, and to that end, met again in their office, when their attorney was present, and again read to Petitioners and their attorney the law under which the Federal Trade Commission was then asserting his authority, and explained his power, which permitted him, and authorized him and empowered him to request and demand testimony and information from Petitioners, and to that end explained to the attorney and Petitioners that by Petitioners' refusing to furnish the information they were committing a crime, and read to the attorney and Petitioners in the same connection with his power to demand the information, his power also to penalize Petitioners if they refused to comply with his demand and request. Having convinced the attorney of Petitioners, the attorney advised Petitioners that they were under the supervision of the Federal Trade Commission, and that they were compelled to comply with the demand or request from the Federal Trade Commission, and furnish information, documentary or otherwise, and testify before the Trade Commission, and if they refused that they were guilty of a crime, and could, by the Federal Trade Commission, be punished. (Tr., 38 and 68; Tr. —.)

We believe our statement that the letter of the Federal Trade Commission directed to the General Lee Interests, and which they received (Tr. 36) was a subpoena; and further in this connection, we call this court's attention to the reading of the statute, Section 7937 (Compiled Statute Section 8836-J) in part as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty," etc.

If we are not correct in this being technically a subpoena, we can at least say that the Federal Trade Commission adopted this method of demanding the information, to the end that they might receive it for its same value and worth as if it had been secured by a subpoena; and this requirement in the letter was the choice of the Trade Commission, and it was its method of seeking to enforce its power; and when he called upon Petitioners he had not further armed himself with any process or subpoena, demands of Petitioners, not that they comply with a subpoena that he then had, or that they comply with any other process other than the letter which he had directed to them, he asked Petitioners why they had not complied with that process, letter, subpoena or lawful request, and furnished the information demanded. (Tr. 37.) This letter was at least a lawful inquiry under the Federal Trade Commission Act, and it called for information to be furnished the Federal Trade Commission in obedience to lawful requirement, and the Federal Trade Commission, speaking through Mr. Southworth, said to Petitioners: "If you neglect or refuse to answer this lawful inquiry or produce the documentary evidence in obedience to the lawful requirement of the Commission, you have committed a crime and subject to punishment for not less than one thousand nor more than five thousand dollars, or imprisonment for not more than one year, or both." (Tr. 37.)

The Circuit Court of Appeals, in affirming this case, says that the plea of immunity is not good because no subpoena was issued and neither of the Petitioners were sworn, and none of the statements made by Petitioners in pursuance of the request or demand of Southworth was under oath. Thereby saying that Southworth was not acting as the Federal Trade Commission, and was not acting within his power and authority when he called

upon Petitioners and demanded and received the information from, and documentary evidence of these Petitioners. The Circuit Court of Appeals by this statement says that the Federal Trade Commission has no authority to demand or receive information except that it subpoena a witness, and cause the witness in obedience to subpoena, to come before it and testify or produce these documents, and that it can not receive such information then except that it swear the witness. If the Circuit Court of Appeals is correct in this, then Southworth, or the Federal Trade Commission, was wrong when it and he stood before Petitioners and said that they were compelled to give this testimony under penalty of being punished as criminals. (Rec., p. 37.)

The Federal Trade Commission, through Mr. Southworth, informed of its authority and powers as it is, well knew that if it pursued the power and authority to demand of any person that he testify before it, and that he furnish it information, that such act by it furnished immunity to the person interrogated and from whom the information was obtained. The same law that gave it the authority to demand the information and receive it, advised it that when it did so, immunity flowed to the man it was seeking the information from by virtue of its own demand, and because of its act it granted immunity to the citizen about the matters it asked him about or got information from him on. **The government would be unfair to its citizens to arm its agents, and permit them to go to this citizen clothed with such authority, and demand information under the penalty of putting him in jail if he refused to give it, then say to him that if he complied with their demand he did not have the benefit of the same law under which they were claiming their authority.**

Mr. Southworth—and thereby the Federal Trade

Commission—thought that he and it had the right to go to Petitioners and demand this information; he convinced Petitioners that he had such a right. Then, in order to deal fairly with the citizen, the government should say to him, “Did you believe that you were compelled to give this information requested and demanded of you by the Federal Trade Commission; if you thought you were compelled to give it, and if you gave it involuntarily to the Federal Trade Commission upon its demand, order, subpoena or other lawful requirement as the statute prescribes, then you have for your safeguard the statute which was enacted for your benefit; as we take from you the benefit and safeguard of the Fifth Amendment, and we armed ourselves with the law which took from you that safeguard, and demanded and compelled you to give us testimony in violation of that amendment; at the same time, the law which gave us that authority, gave you the right to say that you should not be prosecuted for anything concerning which you had testified and furnished information.

We desire to call the court's attention to what we believe is fair dealing between the government and its citizen:

“This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. Whenever the time comes when the courts, in their eagerness to apprehend criminals, deny to the accused that which the laws and the Constitution give him; when men are convicted of offenses against their government, and in the process of that conviction

every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more.” (U. S. vs. Pardue, 294 Fed., 543.)

While the facts of the two cases are not exactly similar, the discussion by the court comprehends the situation such as we have in this case, and we desire again to quote from the above decision:

“In what has been said it is not meant to hold that the mere fact of a subpoena confers an exemption. The controlling question is: Did he testify voluntarily, or upon compulsion; and it is in my opinion immaterial in law whether the witness testified under a subpoena or was called without a subpoena and put upon the witness stand upon compulsion by the government. Upon the controlling issue of fact in cases of this kind, however, whether a witness testified voluntarily or upon compulsion, if a witness appears under a subpoena and is placed upon the stand by the government, the fact of compulsion is *prima facie* established, and the burden shifts to the government to show, notwithstanding all of the indicia of compulsory testimony, the witness in fact waived his privilege and testified voluntarily.” (U. S. vs. Pardue, *Supra.*)

In the instant case the Petitioners have undertaken the burden of showing, both that they were not sub-

poenaed and that they were compelled to testify—at least they were convinced by the Federal Trade Commission that they were compelled to testify, and beyond contradiction this record establishes that they did not testify voluntarily:

The Circuit Court of Appeals in its opinion, adopts, in our judgment, a most unreasonable, unfair and narrow construction of this statute. It says (Rec., p. 93):

“The language of the amnesty or immunity provision, especially when that language is considered in the light of its context, manifests the absence of any intention to grant amnesty or immunity to a person who furnishes evidence without a subpoena to him having been issued by the Commission.”

To establish the narrowness of this, we feel it only necessary to quote to this court the statute:

“No person shall be excused from attending and testifying or from producing documentary evidence before the Commission or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty.” (Art. 8836.)

We ask your patience in this. Congress had in mind that information might be had in other ways than by a subpoena, because it says, “No person shall be excused from attending and testifying,” and it does not refer to “under subpoena or other process.” And it then says, “or from producing documentary evidence before the Commission.” It does not, in this instance, say, “Or in obedience to a subpoena or other process.” And then it says, “or in obedience to a subpoena of the Commission.”

Congress did not see fit to prescribe a form for a subpoena, or direct the mode and manner in which subpoenas should be issued and served for either the attendance of the witness on the production of documentary evidence or the acquisition of the same by the Federal Trade Commission, but it did provide "For the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." This court will see that in this language, Congress said that the officers of the Federal Trade Commission had the right, of course in a lawful manner and mode, to get information, access to documents and take copies thereof. Then, having in mind that some obstruction might be met, or an effort might be made to conceal this information, provides, just following the above: "and the Commission shall have power to require by subpoena the attendance, and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Thereby showing that the Commission had the power and authority to get the information it desired without the issuance of a subpoena, but, if it was necessary, they had the power to compel the witness to give and produce the testimony and documents. Then Congress said: "Any person who shall neglect or refuse to attend and testify (this carries with it the suggestion of answering a subpoena) or to answer any lawful inquiry." If it was intended that a subpoena was necessary to get any information, why should Congress say that a person was guilty of an offense if he failed to answer any lawful inquiry. Further, if a person fails or refuses to testify or produce documentary evidence, "in obedience to the subpoena (of course a subpoena has been issued and served), or to produce documentary evidence in obedience

to a lawful requirement of the commission;" then if a subpoena was the only method, why should Congress say that a citizen was guilty of a crime and subject to punishment if he failed to give information or produce documentary evidence in obedience to a lawful requirement?

The Circuit Court of Appeals has said that before a person can be immune he must have been summoned and attended under the compulsion of a subpoena and give testimony under oath. Congress and the law under which this man claims his immunity, did not so limit his rights.

Congress gave the citizen immunity in at least two instances: One, when he obeys a subpoena and testifies or gives documentary evidence; the other, when he answers a lawful inquiry made in obedience to a lawful requirement of the Commission. And in this instance the Federal Trade Commission asserted in its letter or demand, and through its agent Southworth, that it was making a lawful inquiry, and that petitioners must obey this lawful requirement of the Commission and give testimony under compulsion, and under penalty for refusing. Yet, the Circuit Court of Appeals in this case, says that the only way a person can become immune is to be summoned, attend under process of the subpoena, and give testimony under oath; thereby saying that the only lawful way by which the Federal Trade Commission could get testimony or documentary evidence, is in response to a subpoena; yet, the Federal Trade Commission itself, through Mr. Southworth, says to Petitioners that it had the right to compel them to answer their letter and demand, which they say was an official request, and if Petitioners failed to comply with and obey this official request, Petitioners were guilty of a crime and might be punished." (Tr. 68.)

The Circuit Court of Appeals in its opinion says: "Evidence furnished in compliance with a request or

demand of an examiner of the Commission, without the issuance of a subpoena to the person furnishing such evidence, is not within the terms of the provision." (Tr. 94.)

This is the entire opinion of the Circuit Court of Appeals. These four lines include and comprehend the entire opinion of the court. The rest of the opinion is argument and persuasion, attempting to justify the conclusion reached therein. We can do no better than to again refer the court to the quotation in the case of the United States *vs.* Pardue, to answer this conclusion; and the United States *vs.* Armour & Company, 142 Fed., 808, previously referred to and quoted in this brief.

A subpoena serves the purpose only of compelling a witness to come to the tribunal and testify. If this tribunal sees fit to take itself to the witness and there compel the witness to testify, then a subpoena is useless, and the tribunal has accomplished its purpose without the office of the subpoena; and if the tribunal accomplishes its purposes by a threat or coercion or punishment, the witness has been as much compelled to involuntarily deliver up his testimony and documents as if the tribunal was clothed with all the dignity of a court and its attachees and its processes, and we submit that this record discloses that these Petitioners refused to give testimony or produce documents until the tribunal convinced their attorney, and he advised them that they were compelled, under penalty, to testify and deliver documents; and then, and then only, and not until then, did they answer questions or give information.

We have burdened this court at length, but we thought the rights of these Petitioners would be protected by the Circuit Court of Appeals; but having been disappointed there, we so deeply feel that these Petitioners have been

unjustly and unfairly dealt with that in our eagerness we fear we have trespassed upon your patience.

The Circuit Court of Appeals lightly touches upon the fact that the post office inspectors gathered information and presented same to the grand jury, independent of the Federal Trade Commission, and therefore, these Petitioners were deprived of the rights given them by the law. This is so idle that we do not argue the same with this court. Congress gave these Petitioners immunity when they, under compulsion, gave up their information to the Federal Trade Commission, then they were completely, fully and forever immune from prosecution about any of the things concerning which they testified and furnished information; and when the Federal Government through one agency get the information, under circumstances which give the Petitioners immunity, then another agency of the same government can not deprive them of that immunity.

These questions are not new to our courts, and in every instance to which our citations have led us, our appellate courts have held that the question of immunity, based upon and growing out of the Fifth Amendment, is one sacred to the preservation of the rights of our citizenship. To say that Congress meant to take away from a citizen a valid right and give nothing in return is but idle talk. So that, Congress, under Art. 8836, in taking away the right of a citizen to claim his privilege from testifying, gave and intended to give him absolute immunity from the prosecution of any transaction, matter or thing about which he had previously testified under the conditions set forth therein. There is nothing left of our vaunted civilization if an absolute right of a defendant, given him by law, is not recognized when invoked by him. The law has no surer champion than

the man who feels that he has had the benefit of all its provisions, even though he is ultimately stricken by it; but when one feels its penalties and its rigors without the privilege of enjoying its safeguards and its fairness, he despairs.

Wherefore these Petitioners pray that the judgment of the trial court and the Circuit Court of Appeals be in all things reversed and judgment here rendered for Petitioners, or that the same be remanded to the trial court with instructions to render such a judgment, or else the cause be reversed and remanded for another trial in conformity with the orders of this court.

Respectfully submitted,

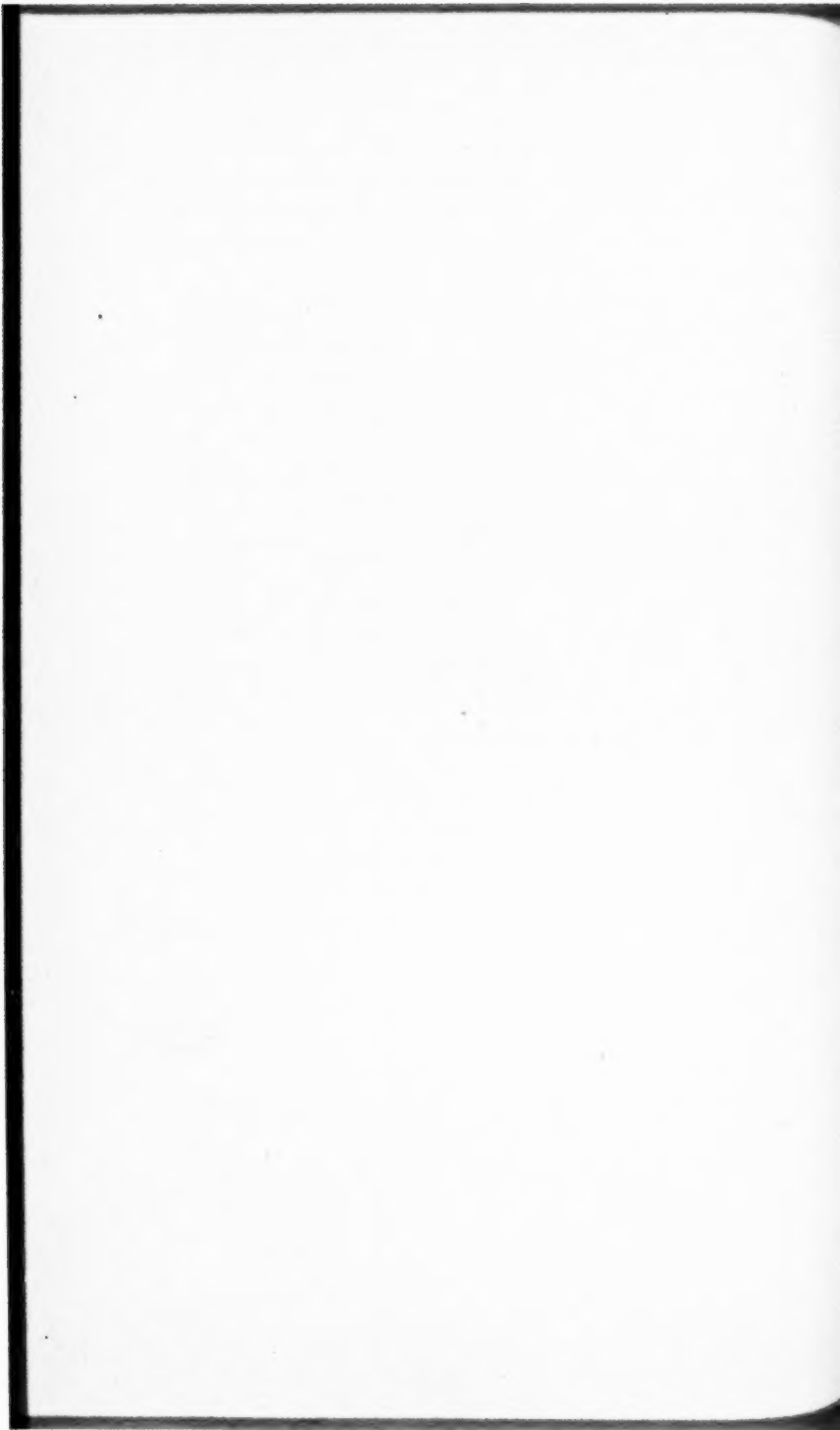
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[PUBLIC—No. 203—63d CONGRESS.]

[H. R. 15613.]

An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh.

eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive.

If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices,

and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to

the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons making the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the

recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

# In the Supreme Court of the United States

OCTOBER TERM, 1924

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CHARLES SHERWIN AND HARRY H.

Schwarz, Petitioners

v.

THE UNITED STATES OF AMERICA

} No. 379

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR THE UNITED STATES

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### STATEMENT OF THE CASE

The petitioners were charged by indictment in the United States District Court for the Northern District of Texas with using the mails to defraud and upon trial were convicted of that crime. Briefly described, their offense consisted in disseminating letters and literature filled with false and fraudulent representations whereby many were induced to buy worthless interests in common-law trusts described by their promoters, these petitioners, as owning and engaged in developing valuable gas and oil properties in Texas. Having for a trifling sum per month employed a common

laborer of the name of Robert A. Lee, they gave his name to their concerns, widely advertised him as a great geologist, denominated him "General," held him out as a member of the famous American family of Lee, close kinsman of the illustrious Confederate Chieftain, and caused his name to be signed to all their letters and printed matter.

No question is now made as to the guilt of the petitioners and there has so far been no effort to minimize the infamy of their acts. The sole question before this court is whether they were entitled to immunity by reason of the provisions of Section 9 of the Act creating the Federal Trade Commission (Act of Sept. 26, 1914, c. 311, 38 Stat. 717), and of a certain investigation of the affairs of their concerns alleged to have been made by an agent for the Federal Trade Commission prior to their indictment and trial.

The Act creating the Federal Trade Commission (38 Stat. 717), after creating the Commission, defining its function to be the prevention of "unfair methods of competition in commerce," empowering it to conduct hearings in the discharge of that function, and authorizing it to investigate "the organization, business, conduct, practices, and management" of corporations engaged in commerce, contains in Section 9, 38 Stat. 717, 723, in the last paragraph thereof, the following language:

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in

obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

The facts by reason of which the petitioners claim the benefit of the immunity provision in Section 9 are the following:

A letter dated at Washington on June 30, 1922, signed "Federal Trade Commission. Otis. B. Johnson, Acting Secretary," addressed to "General Lee Development Interests, Edwards Building, Fort Worth, Texas," which letter appears on page 36 of the Record, requested that concern to furnish the information asked for in a schedule annexed to the letter. The Record does not clearly disclose what information was called for by this schedule. The schedule itself is not set out, although it may reasonably be inferred that the questions appearing on pages 60-65, inclusive, of the Record were contained in it.

Petitioner Charles Sherwin testified (R. 35, 36) that subsequent to the receipt by the General Lee Development Interests of the letter just referred to there appeared at the offices of that concern one John F. Southworth, who represented himself to be an agent of the Federal Trade Commission. Southworth presented petitioners with no evidence of his identity or authority other than his card. In addition to his card they later saw that "he carried a portfolio with letterheads and other documents with the Federal Trade Commission form." There is no further evidence whatever in the record concerning the connection, if any, of Southworth with the Federal Trade Commission excepting the testimony of one J. S. Swinson, a Post Office inspector, who said (R. 69, 70):

I know John F. Southworth. I met him last Fall. I did not talk to him about the General Lee matters. As near as I can get at it, his business is to procure information for the Federal Trades Commission of the United States Government. I think his title is Special Examiner, Federal Trades Commission.

In the whole record there is no evidence, other than the foregoing, that Southworth had any authority from the Federal Trade Commission to make any examination of the General Lee Development Interests or of the business of the petitioners, or that he ever made any report of any kind to that Commission touching any investigation he had made of

these petitioners or the common-law trusts they were promoting.

The further testimony was that after some discussion as to whether the Federal Trade Commission had jurisdiction of such concerns as the General Lee Development Interests the petitioners, according to their testimony, orally answered various questions asked them by Southworth. The substance of the information furnished is set out in the Record at pages 35-69, inclusive.

No subpoena was ever served upon either of the petitioners or any other person connected with their business.

Neither of the petitioners was ever sworn to give testimony nor was any other person sworn to give testimony in connection with their business, nor did any person testify except as petitioners answered questions put to them upon the visit or visits of Southworth. (R. 59.)

There was never a hearing of any kind except as the visits of Southworth might be characterized as a hearing. (R. 59.)

There was never any communication between Southworth or the Federal Trade Commission and the United States Attorney's office, which handled this case, or the Post Office Inspector, who procured the evidence; and none of those who were connected with the prosecution had any knowledge that Southworth or any representative of the Federal Trade Commission had ever investigated the

General Lee Development Interests. (R. 69-71, inclusive.)

There is nothing in the record to show that the petitioners disclosed to Southworth anything whatever that connected or tended to connect them with the crime whereof they were later accused and convicted. The petitioners themselves at no time testified that any of the particular correspondence upon which the indictment was based was shown by them to Southworth.

The District Court held that the facts did not entitle petitioners to immunity. On writ of error the case went to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the District Court. The case is here on certiorari to the Circuit Court of Appeals.

#### ARGUMENT

It seems to us that the argument of this case can adequately be compassed within a few paragraphs, but we respectfully invite the court's attention to the arguments contained in the opinion of the District Court below (R. 82) and of the Circuit Court of Appeals below (R. 89). They clearly, cogently, and briefly summarize the reasoning in favor of the Government's position.

The immunity from prosecution provided by Section 9 is as "to any transaction \* \* \* concerning which he [any natural person] may testify, or produce evidence, documentary or other-

wise, before the commission in obedience to a subpœna issued by it."

He who claims this immunity must show by the very terms of Section 9 (1) *that in obedience to a subpœna*, he has (2) *testified or produced evidence*, (3) concerning the *same transaction* for which it is sought to prosecute him. Absent any of these essentials he can not claim immunity. But none of them is present in this case.

## I

### **There was no subpœna**

There was no subpœna. No one other than a member of the Commission itself had authority to issue a subpœna. (Section 9, paragraph 1, 38 Stat. 722.) No agent of the Commission could issue a subpœna. The Secretary could not issue one. There is no suggestion of any subpœna ever having been issued for the petitioners or either of them or anyone else connected with them.

At the time this brief must go to the printer no brief has been served upon us by petitioners. However, in their brief filed in support of the application for *certiorari*, the contention appears (page 129 of brief in support of application for *certiorari*) that the letter set out on page 36 of the Record and to which no response was ever made was a subpœna. The contention is untenable under any recognized definition of the term.

## II

**Petitioners did not testify under oath**

Not only was there never a subpœna in this case served upon petitioners, but petitioners never testified or produced evidence before the commission within the meaning of that language as employed in Section 9. Obviously formal testimony under oath is here meant. If that were not apparent from the language employed in the section proper, it becomes clear from the proviso "that no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." This presumes formal testimony under oath. The immunity is only for him who has testified under oath. Congress did not intend that a person should at the same time obtain immunity and not be subject to the pains and penalties of perjury. In this case, however, there never was any testimony under oath; hence no such testimony as that which carried immunity with it.

## III

**Not the same transaction**

The third essential is likewise absent from the case. The very general language used by petitioners as to the statements they made concerning their business to Southworth do not support the conclusion (necessary to their argument) that they revealed to him anything relative to the very misrepresentations upon which the indictment was based.

It will be noted that their testimony as to what they said to Southworth does not specifically refer to the letters charged in the indictment to have been sent through the mail. They showed him correspondence, but that they showed him this particular correspondence they do not say. In short, even if their informal statements to Southworth were "testimony" it was not, so far as the record discloses, testimony concerning that for which they have been prosecuted.

#### CONCLUSION

We respectfully submit that immunity can not be based upon disclosures which the record does not show concerned the transactions for which the petitioners were prosecuted, disclosures which were made to one whom the record does not show had any authority from the Federal Trade Commission to investigate, disclosures which were not made under oath nor as a part of testimony nor in obedience to a subpoena. To so greatly broaden the scope of the immunity provision obviously would give rise to innumerable abuses. It would open up an avenue of escape from just punishment that certainly would soon be crowded.

The judgment of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,  
*Solicitor General.*

MERRILL E. OTIS,  
*Special Assistant to the Attorney General.*

APRIL, 1925.

CHARLES SHERWIN ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
FIFTH CIRCUIT.

No. 379. Argued April 16, 1925.—Decided May 25, 1925.

Section 9 of the Federal Trade Commission Act grants immunity from prosecution only where testimony is given or evidence produced before the commission in obedience to a subpoena issued by it, and not where information was furnished upon the demand made by an agent of the commission after the commission had requested such information by letter. P. 372.

290 Fed. 517; 297 *id.* 704, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction and sentence in a criminal case in the District Court in which the petitioner's plea of immunity was denied.

*Mr. S. R. Sayers*, with whom *Mr. W. P. McLean* was on the brief, for petitioners.

*The Solicitor General* and *Mr. Merrill E. Otis*, Special Assistant to the Attorney General, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Sherwin and Schwarz were indicted in the federal court for northern Texas, under § 215 of the Criminal Code, for

using the mails in consummation of a scheme to defraud; and also, under § 37, for a conspiracy to commit the offense. They filed in bar a plea of immunity under § 9 of the Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 723. Their claim was that the indictment rested upon information which the Commission had compelled them to give. There was a replication; issue was joined; a trial was had upon the plea; and under instructions of the court, the jury found against the defendants upon their plea of immunity. They were found guilty upon the various counts of the indictment and sentenced. *United States v. Lee*, 290 Fed. 517. The judgment was affirmed by the United States Circuit Court of Appeals. 297 Fed. 704. This Court granted a writ of certiorari. 265 U. S. 578. Whether the giving of the information under circumstances to be stated created an immunity is the sole question for decision.

The Federal Trade Commission Act in § 5 empowers and directs the commission to prevent the use of unfair methods of competition and provides for proceedings to that end. In § 6 it provides that the commission shall have power to investigate the practices of corporations engaged in interstate commerce; and may require of them special reports in writing, under oath or otherwise, concerning their practices. In § 9 it provides that the commission or its agents shall "have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against"; and "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence." Methods of enforcing obedience to such orders are provided by § 9. Refusal "to attend

and testify, or to answer any lawful inquiry, or to produce documentary evidence . . . in obedience to the subpoena or lawful requirement of the commission" is punishable criminally under § 10. It is further provided by § 9:

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise; required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Sherwin and Schwarz were the promoters of alleged gas and oil properties conducted under the names of General Lee Interests Nos. 1 and 2, and General Lee Development Interests. The commission addressed to the concern letters requesting, under §§ 5, 6, 9 and 10 of the Act, detailed information in writing concerning its organization and business. No reply was made thereto. Later, an agent of the commission, referred to as a special examiner, called in person at the office of the concern and demanded the information. This was at first refused, on the ground that the concern, being a common law trust, was not subject to the jurisdiction of the commission. The agent insisted that the Act required Sherwin and Schwarz to give the information and answers sought; pointed out that refusal to comply with the commission's request would subject them to the criminal penalties provided in the Act; and, in so doing, omitted to call to

their attention the provision granting immunity from subsequent prosecution under certain circumstances. Conferences were then had with their legal adviser. Thereupon, they gave the agent access to books and papers; furnished him copies of some documents; and answered freely the enquiries made by him. It does not appear that the commission, or any member thereof, ever issued any order in the matter. There was no hearing of any kind, unless the informal conversations of the agent with Sherwin and Schwarz could be called such. No subpoena from any source was ever served upon Sherwin or Schwarz or any other person connected with their business. No one made any answer under oath either orally or in writing. There was no claim by Sherwin or Schwarz of immunity, or that the giving of information might tend to incriminate them. The subsequent prosecution which resulted in the indictment was instituted by a post office inspector. It does not appear that the Federal Trade Commission had any part in the prosecution or communicated any of the information gained to any government officials who did have; or that any fact was elicited by the commission which connected Sherwin and Schwarz with the crime of which they were convicted.

The question is not, as in *Councilman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591; and *Hale v. Henkel*, 201 U. S. 43, whether the immunity provided by the Act is sufficiently broad to deprive the witness of his constitutional privilege against self-incrimination. It may be that, for this and other reasons, Sherwin and Schwarz could not have been compelled to furnish the information which they gave. See *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298. The question is not, as in *Glickstein v. United States*, 222 U. S. 139, and *Cameron v. United States*, 231 U. S. 710, whether an admitted immunity extends to the particular attempted use of the testimony. Nor is it necessary to

consider the question involved in *Heike v. United States*, 227 U. S. 131, whether the information given was beyond the protection of the immunity provision because not of an incriminating nature and but remotely, if in any way, connected with the transactions forming the basis of the later prosecution. The immediate question here is whether, under this particular immunity provision, the mere furnishing of information of whatever character creates an immunity which bars the prosecution. Compare *Tucker v. United States*, 151 U. S. 164, 167-169.

The question is said to be one of statutory construction. But, upon the facts stated, it is clear that there was no basis for the plea of immunity. The Act grants immunity only when the person testifies or produces evidence "before the Commission in obedience to a subpoena issued by it." Sherwin and Schwarz did nothing in obedience to a subpoena. None was issued. Whether the judgment below was right for other reasons also, we need not consider. The case is wholly unlike *United States v. Pardue*, 294 Fed. 543.

*Affirmed.*